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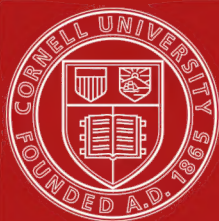
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Leading cases in the commercial law of E



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LEADING CASES  
IN THE  
COMMERCIAL LAW  
OF  
ENGLAND AND SCOTLAND.

SELECTED AND ARRANGED IN SYSTEMATIC ORDER,  
WITH NOTES.

BY  
GEORGE ROSS, ESQ., ADVOCATE,

AUTHOR OF  
"LEADING CASES IN THE LAW OF SCOTLAND."

VOLUME THIRD.

*Suretyship, Agency, Partnership and Insurance.*

---

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# LEADING CASES

IN THE

## COMMERCIAL LAW OF ENGLAND AND SCOTLAND.

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### PRINCIPAL AND SURETY.

IN ENGLAND A CONTRACT OF GUARANTEE MUST BE IN WRITING, AND IF IT BE MADE BY WRITING NOT UNDER SEAL, THE CONSIDERATION MUST APPEAR ON THE FACE OF THE INSTRUMENT, EITHER EXPRESSLY OR BY CLEAR IMPLICATION, OR FROM OTHER DOCUMENTS CONNECTED WITH THE INSTRUMENT, BUT IT CANNOT BE SUPPLIED BY PAROLE EVIDENCE.

#### 1.—WAIN v. WALTERS.

April 19, 1804.—E. 5 East, 10.

THE plaintiff's declared, that at the time of making the promise after mentioned, they were the indorsees and holders of a bill of exchange, dated the 14th of February, 1803, drawn by one W. Gore, upon and accepted by one J. Hall, whereby Gore requested Hall, seventy days after date, to pay his (Gore's) order, £56, 16s. 6d., which bill of exchange Gore had before then indorsed to the plaintiffs, and which sum in the bill mentioned was, at the time of making the promise by the defendant, due and unpaid; and thereupon the plaintiffs, before and at the time of making the said promise by the defendant, had retained one A. as their attorney, to sue Gore and Hall respectively for the recovery of the said sum so due, &c., whereof the defendant, at the time of his promise, &c., had notice; and \*thereupon, on the 30th of April, 1803, at, &c., in consideration of the premises; and that the plaintiffs, at the instance [\*2] of the defendant, would forbear to proceed for the recovery of the said £56, 16s. 6d., he, the defendant, undertook and promised the plaintiffs to pay them, by half-past four o'clock on that day, £56, and the expenses which had then been incurred by them on the said bill. The plaintiffs then averred that they did, within a reasonable time after the defendant's

promise, stay all proceedings for the recovery of the said debt, and have hitherto forborne to proceed for the recovery thereof, and that the expenses by them incurred on the said bill, at the time of making the promise by the defendant, and in respect of their having so retained the said A., and on account of his having, before the defendant's said promise, drawn and engrossed certain writs, called *special capias*, against Gore and Hall respectively, on the said bill, amounted to £20, of which the defendant had notice; yet the defendant did not, at half-past four o'clock on that day, &c., nor at any time before or since, pay the said sum of £56, and the said expenses incurred, &c. There was another special count, charging that the reasonable expenses incurred on the bill were so much, which the defendant had refused to pay, and the common money counts.

In support of the undertaking laid in the declaration, the plaintiffs, at the trial at Guildhall, produced the written engagement, signed by the defendant, which was in these words: "Messrs. Wain and Co., I will engage to pay you, by half-past four this day, fifty-six pounds, and expenses on bill that amount on Hall. (Signed) JNO. WARLTERS, (and dated) No. 2, Cornhill, April 30th, 1803." Whereupon it was objected on the part of the defendant, that though the promise, which was to pay the debt of another, were in writing, as required by the Statute of Frauds, yet that it did not express the consideration of the defendant's promise, which was also required by the statute to be in writing; and that this omission could not be supplied by parole evidence (which the plaintiffs proposed to call, in order to explain the occasion and consideration of giving the note;) and that for want of such consideration appearing upon the face of the written memorandum, it stood simply as an engagement [\*3] to pay the debt of another, without any consideration, \*and was therefore *nudum pactum* and void; and Lord Ellenborough, C. J., upon view of the Statute of Frauds, 29 Car. II., cap. 3, sec. 4, which avoids any special promise to answer for the debt of another, "unless the agreement upon which the action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith," &c., thought that the term agreement imported the substance at least of the terms on which both parties consented to contract, and included the consideration moving to the promise, as well as the promise itself; and the agreement in this sense not having been reduced to writing, for want of including the consideration of the promise, he thought it could not be supplied by parole evidence, which it was the object of the statute to exclude, and therefore nonsuited the plaintiffs. A rule *nisi* was obtained in the last term for setting aside the nonsuit and granting a new trial, on the ground that the statute only required the promise, or binding part of the contract to be in writing, and that parole evidence might be given of the consideration, which did not go to contradict, but to explain and support the written promise.

*Garrow* and *Lawes* showed cause against the rule.—The question is simply this, Whether parole evidence can be given of an agreement which the Statute of Frauds avoids, unless it be in writing? The words are, "That no action shall be brought, whereby to charge the defendant, upon any special promise, to answer for the debt, &c., of another person, &c.,



unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith," &c. Now, to every agreement there must be at least two parties, and, in order to make it available in law, there must be some consideration for it, which necessarily forms part of the agreement itself, being that in respect of which either party consents to be bound. It is no answer to say, that the parole evidence offered of the consideration, namely, the forbearance to sue Hall, did not go to contradict the written promise; it is enough that being part, and a material part, of the agreement, it was not reduced to writing, and signed by the party to be charged, as \*required by the statute. The effect of such [\*4] parole evidence, if admitted, would be to render valid that which, so far as appears by the writing itself, is void in law for want of a consideration, and this would be letting in all the dangers of fraud and perjury, which it was the object of the statute to guard against. Upon the face of the paper, the debt appears to be the debt of another, and as a mere promise to pay the debt of another, without any consideration, would, before the statute, have been void, as *nudum pactum* at common law, so it is not made good by the statute, without a consideration in law for entering into such an agreement, which agreement, i. e., the whole agreement, or some memorandum or note of the whole, specifying the contracting parties, the consideration, and the promise must be made in writing. The consideration is an essential part of every executory agreement, and this was altogether executory, on the part at least of the defendant. If the agreement had been declared on as in writing, the mere production of the note would not have proved the consideration of forbearance laid in the declaration, and such consideration could not have been supplied by parole evidence. In *Preston v. Marceau*, 2 Blac. 1249, where the plaintiff had agreed, in writing, with the defendant's testator to let him certain premises at a certain rent, parole evidence, tendered to show that the tenant had agreed to pay a farther sum for ground rent to the ground-landlord, was rejected, as subversive of the Statute of Frauds, although it was there contended, that the evidence offered did not go to alter, but to explain the agreement; so in *Gunnis v. Erhart*, 1 H. Blac. 289, the verbal declaration of an auctioneer at the time of a sale, that there was a charge on the estate, was deemed inadmissible to contradict the printed conditions, which stated the premises to be free from all incumbrances.

*Erskine* and *Marryat*, in support of the rule, said,—That the evidence tendered in the two cases cited, went not to explain but to contradict the written agreements. In the one case to increase the *quantum* of the rent specified, in the other to subtract so much as the charge amounted to from the value of the estate which was offered for sale free from incumbrances. But here the parole evidence went merely to show on what \*occasion the written agreement had been entered into; and it is in common practice to admit parole evidence for such a purpose; [\*5] it is part of the *res gestæ*, and no part of the agreement itself, which must in its nature be executory at the time of the writing made. The foundation of the action in this case is not the writing, but the promise by the defendant to pay the debt of Hall. This, before the Statute of Frauds,

might have been proved wholly by oral testimony; but since that statute, the promise can only be evidenced by writing, signed by the party to be charged therewith, or by some other lawfully authorized. It is difficult indeed to account for the introduction of the word agreement into the latter part of the clause, which in its strict sense, as compounded of "*aggregatio mentium*, or the union of two or more minds, in a thing done or to be done." 1 Com. Dig. 311, is more properly applicable to the other branches of the clause, namely, "an agreement on consideration of marriage, or upon contract or sale of lands, &c., or upon any agreement not to be performed within the space of one year, &c., than to any special promise by an executor to answer damages out of his own estate, or to any special promise to answer for the debt, &c., of another." To such promises the word agreement can only be considered applicable, so far as it is synonymous to engagement or undertaking, in which sense it is often used in common parlance, and therefore means, in this respect, the agreement or promise to pay the debt of another. Besides, the statute does not require the whole agreement to be set out in form; but it is sufficient if there be a note or memorandum of it in writing, that is, so much of the agreement as is obligatory on "the party to be charged therewith." In whatever form of words, therefore, the promise is made, which, before the statute, would have been evidence to bind the party making it under the circumstances of the case, it will, if those words are reduced into writing, still bind him since the statute under the like circumstances; but in either case, the inducement for making such promise, which is part of the *res gestæ*, may be evidenced by parole. Thus, suppose a promise in writing to pay the expenses attending a certain bill drawn by another, parole evidence must necessarily be let in to show to what bill the promise [\*6] was meant to apply, and how the expenses arose, and the bill itself \*would be produced; and this would be evidence not to vary, but to corroborate the written promise. The third, seventh, and seventeenth sections of the act all require the signature of the party to some note in writing, in order to charge him with the several subject-matters of those sections; but in all those cases, the party must be charged on the special written agreement; but here he is charged on the promise, of which the writing is only evidence. Yet the fourth section supposes that the party is to be charged upon the agreement, "unless the agreement upon which such action shall be brought," &c; which shows that agreement, as there used, means no more than undertaking or engagement; and in this sense an agreement, signed by one party only, on a sale by auction, was holden sufficient to charge him within the Statute of Frauds. *Seton v. Slade*, 7 Ves. jun. 265. [LORD ELLENBOROUGH, C. J.—There it was deemed sufficient proof of such agreement, so as to charge the party signing it. He was estopped by his signature from protecting himself under the statute; but there the consideration appeared in writing.] They then observed, that though the objection must have often before occurred in actions of this sort, which were in common practice, the word agreement had never before received such a construction as applicable to this branch of the clause.

Lord ELLENBOROUGH, C. J., after noticing the definition of the word

agreement by Lord C. B. Comyns, who considered it as a thing to which there must be the assent of two or more minds, and which, he says, ought to be so certain and complete, that each party may have an action upon it ; for which, in addition to the author's own authority, was cited that of Plowden, and better (his lordship observed) could not be cited. In all cases where, by long habitual construction, the words of a statute have not received a peculiar interpretation, such as they will allow of, I am always inclined to give to them their natural ordinary signification. The clause in question, in the Statute of Frauds, has the word agreement, ("unless the agreement, upon which the action is brought, or some memorandum or note thereof, shall be in writing," &c.) And the question is, Whether that word is to be understood in the loose incorrect sense in which it may sometimes be used, as synonymous to [\*7] promise or undertaking, or in its more proper and correct sense, as signifying a mutual contract or consideration between two or more parties? The latter appears to me to be the legal construction of the word, to which we are bound to give its proper effect ; the more so, when it is considered by whom that statute is said to have been drawn, by Lord Hale, one of the greatest judges who ever sat in Westminster Hall, who was as competent to express as he was able to conceive the provisions best calculated for carrying into effect the purposes of that law. The person to be charged for the debt of another is to be charged, in the form of the proceeding against him, upon his special promise, but without a legal consideration to sustain it, that promise would be *nudum pactum* as to him. The statute never meant to enforce any promise which was before invalid, merely because it was put in writing. The obligatory part is indeed the promise, which will account for the word promise being used in the first part of the clause ; but still, in order to charge the party making it, the statute proceeds to require that the agreement, by which must be understood the agreement in respect of which the promise was made, must be reduced into writing. And indeed it seems necessary for effectuating the object of the statute, that the consideration should be set down in writing, as well as the promise, for otherwise the consideration might be illegal, or the promise might have been made upon a condition precedent, which the party charged may not afterwards be able to prove, the omission of which would materially vary the promise, by turning that into an absolute promise which was only a conditional one ; and then it would rest altogether on the conscience of the witness to assign another consideration in the one case, or to drop the condition in the other, and thus to introduce the very frauds and perjuries which it was the object of the act to exclude, by requiring that the agreement should be reduced into writing, by which the consideration, as well as the promise, would be rendered certain. The authorities referred to by Comyns, Plowden, 5 a, 6, a, 9, to which may be added Dyer, 336 b, all show that the word agreement is not satisfied unless there be a consideration, which consideration forming part of the \*agreement, ought therefore to have been shown ; and the promise [\*8] is not binding by the statute unless the consideration, which forms part of the agreement, be also stated in writing. Without this we shall

leave the witness, whose memory or conscience is to be refreshed, to supply a consideration more easy of proof, or more capable of sustaining the promise declared on. Finding, therefore, the word agreement in the statute, which appears to be most apt and proper to express that which the policy of the law seem to require; and finding no case in which the proper meaning of it has been relaxed, the best construction which we can make of the clause, is to give its proper and legal meaning to every word of it.

GROSE, J.—It is said that the parole evidence tendered does not contradict the agreement; but the question is, Whether the statute does not require that the consideration for the promise should be in writing, as well as the promise itself? Now the words of the statute are, "That no action shall be brought whereby to charge the defendant, upon any special promise, to answer for the debt, &c., of another person, &c., unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing," &c. What is required to be in writing, therefore, is the agreement, (not the promise, as mentioned in the first part of the clause,) or some note or memorandum of the agreement. Now the agreement is that which is to show what each party is to do or perform, and by which both parties are to be bound; and this is required to be in writing. If it were only necessary to show what one of them was to do, it would be sufficient to state the promise made by the defendant who was to be charged upon it. But if we were to adopt this construction, it would be the means of letting in those very frauds and perjuries which it was the object of the statute to prevent; for without the parole evidence, the defendant cannot be charged upon the written contract, for want of a consideration in law to support it. The effect of the parole evidence, then, is to make him liable; and thus he would be charged with the debt of another by parole testimony, when the statute was passed with the very intent of avoiding [\*9] such a charge, by requiring that the agreement, by \*which must be understood the whole agreement, should be in writing.

LAWRENCE, J.—From the loose manner in which the clause is worded, I at first entertained some doubt upon the question; but upon further consideration, I agree with my lord and my brothers upon their construction of it. If the question had arisen merely on the first part of the clause, I conceive that it would only have been necessary that the promise should have been stated in writing; but it goes on to direct that no person shall be charged on such promise unless the agreement, or some note or memorandum thereof, that is, of the agreement, be in writing, which shows that the word agreement was meant to be used in a sense different from promise, and that something besides the mere promise was required to be stated. And as the consideration for the promise is part of the agreement, that ought also to be stated in writing.

LE BLANC, J.—If there be any distinction between agreement and promise, I think that we must take it that agreement includes the consideration for the promise, as well as the promise itself; and I think it is the safer method to adopt the strict construction of the words in this case, because it is better calculated to effectuate the intention of the act,



which was to prevent frauds and perjuries, by requiring written evidence of what the parties meant to be bound by. I should have been as well satisfied, however, if, recurring to the words used in the first part of the clause, they had used the same words again in the latter part, and said, "unless the promise or agreement upon which the action is brought, or some note or memorandum thereof, shall be in writing." But not having so done, I think we must adhere to the strict interpretation of the word agreement, which means the consideration for which, as well as the promise, by which the party binds himself.

Rule discharged.

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\*II.—MORLEY v. BOOTHBY. [ \*10 ]

May 14, 1825.—E. 3 Bing. 107. Eng. Com. Law Reps., vol. 11.

THE plaintiffs declared that in consideration that the said plaintiffs, at the request of the said defendants, would sell and deliver to certain persons using the style of William Clarke, Son, and Co., certain goods, wares, and merchandises of certain value, to wit, of the value of £174, 13s. 5d., to be used in and about building a certain church, to wit, St. Philip's Church, at Sheffield, in the county of York, to be paid for by a bill of exchange, to be drawn by the said plaintiffs upon the said William Clarke, Son, and Co., to be payable at a certain day then to come, to wit, at a day not earlier than the 27th day of November then next, the said defendants undertook, and then and there faithfully promised the said plaintiffs that the said bill should be paid when due, out of such moneys as the said defendants should receive before the said bill should become due, for and on account of the building of the said church; and the said plaintiffs aver that they, confiding in the said promise and undertaking of the said defendants, did afterwards, to wit, on, &c., at, &c., sell and deliver to the said William Clarke, Son, and Co., divers goods, wares, and merchandises of the value aforesaid, to be used in and about the building of the said church, and did afterwards, to wit, on the 27th day of May in the year aforesaid, draw a certain bill for the said sum of money on the said William Clarke, Son, and Co., payable to the order of the said plaintiffs, at a certain day, not sooner than the 27th of November in the year aforesaid, to wit, on the 30th day of the month last aforesaid; and the said William Clarke, Son, and Co., then and there duly accepted the said bill; and although the said bill afterwards, and when the same became due and payable, to wit, on the 30th day of November in the year aforesaid, in the county aforesaid, was duly presented for payment thereof, and although the same was then and there dishonored by the said William Clarke, Son, and Co., the said acceptors thereof, of which said premises, the said defendants, afterwards, to wit, on, &c., at, &c., had notice; and although the said defendants received before the bill became \*due, and from thence hitherto have had sufficient moneys for and on account of the building the said church to [ \*11 ]

satisfy the said bill, yet the said defendants, not regarding their said promise and undertaking, but contriving and intending to deceive and defraud the said plaintiffs in this respect, have not (although often requested so to do) guaranteed the payment of the said bill, or paid, or cause to be paid, the sum of money therein specified, or any part thereof, to the said plaintiffs.

There were various other counts, but all stating in substance the same undertaking.

The defendants pleaded, that the supposed promise was a special promise to answer for the debt of other persons, to wit, the said persons using the style of William Clarke, Son, and Co.; and that no agreement, in respect of or relating to the supposed cause of action, or any memorandum or note thereof, wherein the consideration for the said promise was stated or shown, was, according to the form of the statute in such case made and provided, in writing or signed by the said defendants, or by any other person or persons by them thereunto lawfully authorized. The plaintiffs replied, that a certain agreement, in respect of and relating to the said cause of action, wherein the consideration for the said promise was stated and shown, was, according to the form of the statute in such case made and provided, made in writing and signed by the said defendants, which said last mentioned agreement was and is to the effect following, that is to say:—

“Messrs. Morley and Co.

“We hereby promise that your draft on William Clarke, Son, and Co., due at Messrs. Masterman’s at six months, due on the 27th of November next, shall be then paid out of money to be received from St. Philip’s Church; say, amount £174, 13s. 5d., say 27th November. We are, yours,

“W. CLARKE. W. BOOTHBY.”

“*Sheffield, May, 26, 1824.*”

And this the said plaintiffs are ready to verify.

Demurrer, assigning for cause, that the supposed agreements in writing, mentioned in the replications, do not state or show, \*ac-  
[ \*12 ] cording to the form of the statute in such case made and provided, any such considerations or consideration for the promises or promise as in and by the declaration are alleged to have been the considerations of such promises respectively; and also for that the supposed agreements in the said replications mentioned, do not, according to the form of the statute in such case made and provided, state or show any considerations or consideration for the promises mentioned and set forth in the declaration, or for any or either of those promises. Joinder in demurrer.

The action against Boothby alone was upon an undertaking in substance the same as the above, and the pleadings were framed accordingly.

*Onslow*, Serjt., in support of the demurrer, relied on *Wain v. Walters*, ante, p. 1; *Lyon v. Lamb*, *Fell. Merc. Guar.* 260; *Saunders v. Wakefield*, 4 B. and A. 595; and *Jenkins v. Reynolds*, 3 B. and A. 14, and contended that no consideration for the defendants’ promise

appeared on the face of these instruments, the language respecting St. Philip's Church not being intelligible without recourse to oral testimony, which it was the express object of the Statute of Frauds to exclude.

*Pell*, Serjt., contra, said, that, admitting the correctness of the principle laid down in *Wain v. Warlters*, there had always been much indecision in the application of it, as it frequently led to great injustice, and promoted breach of faith. He referred to the language of *Dallas, C. J.*, in *Pace v. Marsh*, 1 Bing. 216—"These cases ought not to be encouraged beyond what the law strictly warrants; because parties too frequently by entering into such engagements occasion extensive credit to be given, and then get out of their obligation in any way they can;"—and to the disapprobation expressed by the chancellor in *Ex parte Minet*, 14 Ves. jun. 190, on the subject of the doctrine laid down in *Wain v. Warlters*. A very slight indication of the consideration for the defendants' promise had been holden sufficient; and the case of *Boehm v. Campbell*, 3 B. M. 15, where the guarantee was sustained, could not be distinguished from the present, in which, from the date of the \*guarantee, and the language of the bills, the consideration [\*13] was sufficiently connected with the building of the church.

*Onslow* replied, that *Boehm v. Campbell* was anterior to *Saunders v. Wakefield* and *Jenkins v. Reynolds*, and that the consideration in that case was more apparent than in the present.

*Cur. adv. vult.*

*BEST*, C. J., now delivered the judgment of the court, and after stating the pleadings, and observing, that though a sufficient consideration for the defendants' promise was stated in the declarations, the instruments set out in the replications did not contain any proof of the averments in the declarations, said—

The common law protected men against improvident contracts. If they bound themselves by deed, it was considered that they must have determined upon what they were about to do, before they made so solemn an engagement; and therefore it was not necessary to the validity of the instrument, that any consideration should appear on it. In all other cases the contract was invalid, unless the party making the promise was to obtain some advantage, or the party to whom it was made was to suffer some inconvenience in consequence of the one making, or the other accepting such promise.

If the contract was oral, the benefit or inconvenience, as well as the other parts of the contract, could only be proved by parole testimony. When the contract was reduced to writing, it was required not only that the obligatory part, but that the inducement or consideration should also be in writing, because it was always a rule in the law of evidence, that no parole testimony could be admitted, either to supply the defects or explain the contents of a written instrument. If the writing did not prove the consideration, it could not be proved in any other manner, and thus the contract failed, because the consideration, without which it was altogether inoperative, could not be shown. When the Statute of Frauds declared that no person should be charged with the debt of another except on an agreement

[\*14] in writing, if the clause in the statute had not expressed \*(as I think it does) that the whole agreement should be in writing, the law of evidence would have rendered it necessary the whole should have been in writing, by declaring, as it uniformly has done, that nothing could be added to the terms expressed in writing by parole testimony. Applying the principles of common law to the statute, which is a safe mode of construing acts of the legislature, I say, as I said in *Saunders v. Wakefield*, that if I had never heard of *Wain v. Warlters*, I should have held, that a consideration must appear on the face of the written instrument. It must also occur to any one, that to attain the avowed object of the Statute of Frauds, (namely, the prevention of perjury,) it is more necessary to require that the consideration of a bargain should appear in writing, than any other term or condition of it. That the consideration should appear on the instrument, not in any set formal terms, but with clearness enough for the courts to judge of its sufficiency, is now fully established by *Wain v. Warlters*, and *Saunders v. Wakefield*, in the king's bench, and *Jenkins v. Reynolds*, in this court.

The present lord chancellor is reported to have expressed himself, in *Ex parte Minet*, dissatisfied with the judgment of *Wain v. Warlters*. I think his lordship must have been mistaken by the reporter, who has made the chancellor say, "The undertaking of one man for the debts of another does not require a consideration moving between them." No court of common law has ever said that there should be a consideration directly between the persons giving and receiving the guaranty. It is enough if the person for whom the guarantor becomes surety has benefit, or the person to whom the guaranty is given suffer inconvenience, as an inducement to the surety to become guaranty for the principal debtor.

The chancellor did not decide this point in that case. In *ex parte Gardom*, 15 Ves. jun. 288, this question came again before the chancellor, and his lordship again expressed his dissatisfaction at *Wain v. Warlters*, but his judgment is not in opposition to the authority of that case. The judgment of the chancellor was, that there was a sufficient consideration expressed in the guarantee.

I must observe, that *Saunders v. Wakefield*, and *Jenkins v. Reynolds* have been decided by the king's bench and the common pleas since the cases in equity.

In the cases of *Boehm v. Campbell* and *Pace v. Marsh*, this court did not mean to over-rule them, but gave their judgments on the ground that there was a sufficient consideration expressed on the written instruments. In both those cases a by-gone consideration was expressed on the guarantees; whether such consideration was sufficient, it is not now material to inquire, because in the instruments set in these declarations there are neither past nor future considerations. It does not appear that the credits which had previously been given to the original debtors were excused in consequence of those guarantees. When the bills which had been given were at maturity, the debtors could be sued as well after as before the giving of the guarantees. The debtors had no benefit, nor did the creditors put themselves to any inconvenience in consequence of

the execution of those instruments. Although one of the papers speaks of money for St. Philip's Church, it does not appear that the persons subscribing such paper had anything to do with any such money. The replications setting forth these guarantees do not support the declaration, and we are of opinion there must be judgment for the defendants. Judgment for the defendants accordingly.

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In *Jenkins v. Reynolds*, 3 B. and B. 14, the letter of guarantee was in these terms:—"GENTLEMEN,—To the amount of £100 be pleased to consider me as security on Mr. James Cowey and Co.'s account," and it was found not to be sufficient. RICHARDSON, J., observes,—“The object of the Statute of Frauds was to prevent perjury, or subornate of perjury, by causing that to be reduced to writing, which before might have been proved by oral testimony, and such a construction ought to be put on the clause in question, as will best effect the intentions of the legislature. Now, is the memorandum such as will satisfy these intentions? On the face of the memorandum it does not appear whether the agreement relates \*to a past or a future transaction; it might apply to either, or even to an illegal debt. Whatever is necessary to render it available must be supplied by oral testimony; and with that view the declaration is fraud, stating the promise to have applied to a future supply of goods. Supposing that to have been so, and suppose the plaintiffs instead of supplying goods had advanced money, that would not have fallen within the intention of the guarantee, but it would have rested altogether on the conscience of the witness to say, whether the guarantee applied to the one or the other; and parole evidence so let in would lead to the very perjury or subornation which it was the object of the statute to exclude. The statute regulates that the substance of the cause of action should appear in writing, and the consideration or the substance of an agreement.” In *Innes v. Williams*, 5 B. and Ad. 1109, the guarantee was in these terms:—"As you have a claim on my mother for £5, 17s., for boots and shoes, I hereby undertake to pay you the amount within six weeks, say the 4th of January 1833." This guarantee was held to be not within the Statute of Frauds. PATTISON, J., observed,—“The rule of construction on the subject is clear. The consideration need not be stated in express words on the face of the instrument. It may be collected or implied from the instrument itself, but then it must be collected, not as matter of conjecture, but with certainty.” In *Coe v. Duffell*, 7 Moore, 252, the guarantee itself did not state the consideration, but had been preceded by a letter, proposing the terms on which he was granter of the guarantee; and it was held that the correspondence and guarantee were to be taken together and constituted a sufficient consideration for a promise within the Statute of Frauds. PARK, J., observed,—“We decided in the late case of *Jackson v. Lowe*, 7 Moore, 219, that two distinct writings might be connected or taken together so as to constitute a memorandum within the terms of the Statute of Frauds, and here the defendant in his first letter expressly referred to the terms on which the guarantee was to be given.”

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\*IN SCOTLAND THE GENERAL RULE OF LAW IS, THAT A CAUTIONARY OBLIGATION CANNOT BE ESTABLISHED EXCEPT BY A PROBATIVE WRITING; BUT IF A REI INTERVENTUS HAS TAKEN PLACE  
JULY, 1858.—2 [ \*17 ]

ON THE FAITH OF THE OBLIGATION, THE OBLIGATION MAY BE PROVED BY A REFERENCE TO OATH.

## I.—WALLACE v. WALLACE.

Nov. 25, 1782.—S. Mor. 17056. 2 Hailes, 912.

WILLIAM WALLACE subscribed an obligatory missive letter, not holograph of himself, by which "he became bound to relieve Catherine Wallace of a cautionary engagement," incurred by her father for a third party.

Catherine Wallace brought an action against him on that ground, when he judicially acknowledged the subscription, but contended, that by its wanting the statutory solemnities the writing was null.

The cause was advocated from an inferior judge, who had assoilzied the defender.

Lord BRAXFIELD, Ordinary, repelled the reasons of advocacy.

The pursuer reclaimed to the court, but their lordships refused her petition without answers.

LORD BRAXFIELD.—Writing is essential to cautionary obligations; and whenever writing is necessary, no acknowledgment of subscription will serve to supply legal imperfections in the deed.

LORD PRESIDENT.—The petitioner quotes many decisions; and it must be confessed that the court wavered as to this point. But the later decisions support Lord Braxfield's opinion.

[\*18] Lord HAILES.—Lord Coalston combated long that opinion; \*but at length, with great candour and propriety, he yielded.

"The lords assoilzied," adhering to Lord Braxfield's interlocutor.

## II.—EDMONSTONE v. LANG.

June 23, 1786.—S. Mor. 17057. 2 Hailes, 995.

WILLIAM LANG granted a missive letter, binding himself as cautioner for his son-in-law, who was a tenant of Sir Archibald Edmonstone's.

The writing was not holograph, and it wanted witnesses; but the genuineness of the subscription could not be denied.

Being sued by Sir Archibald Edmonstone, William Lang pleaded;—That his letter imported a cautionary obligation, to the constitution of which the solemnities prescribed by the Statute 1681, were essentially requisite.—25th November 1782, Wallace v. Wallace.

The court considered the point as now solemnly fixed by the later decisions, that missive letters of the nature of the one here founded on were not obligatory or actionable. The forms made necessary by the statute, it was observed, were not intended solely by way of proof, or to guard against forgery, of which there was no danger when the party acknowledged his subscription, but were also required in point of solemnity, and therefore on no account to be dispensed with.

The judgment of the lord ordinary was in these terms :—"In respect the defender does not deny his subscription libelled on, nor that his son-in-law has entered into possession of the subjects, for the rents of which the defender, by the said letter, agreed to become cautioner, repels the defences; and decerns."

But after advising a reclaiming petition for the defender, [\*19] \*with answers for the pursuer, "the lords found, that the writing in question was not obligatory; and, therefore, altered the lord ordinary's interlocutor."

LORD BRAXFIELD.—It is a settled point that a cautionary obligation is a *litterarum obligatio*, and must be executed by a perfect writing. The seeing the principal party in possession is nothing.

LORD ESKGROVE.—The acknowledgment of the writing is not sufficient in this case, although it might be in *re mercatoria*.

LORD MONBODDO.—When a subscription is acknowledged in a writing which does not fall under the act 1681, that constitutes a *litterarum obligatio*. Besides, the cautioner, on seeing his son-in-law, the principal party, possessed of the subject, ought to have intimated to the factor that he would not be bound for him. A man may become bound by what he omits to do.

LORD SWINTON.—In our law we have *litterarum obligationes* and consensual contracts; the former are in matters of importance. A cautionary obligation is of that nature.

LORD PRESIDENT.—I also imagined this point to be settled. In *re mercatoria* such informal writings are permitted to have force, but not in other cases. In the case of Lennox of Woodhead, the *ratio decidendi* was, that the cautionary for 500 bolls of victual was in *re mercatoria*. There is no danger from a decision finding the cautioner not bound; on the contrary, this will make men more attentive to the regularity of their contracts.

LORD HAILES.—The factor has been exceedingly careless, and a legal advantage has been taken of him.

LORD ROCKVILLE of the same opinion, and added,—That the first offer was of two cautioners, and the factor ought to have \*had it adjudged whether one of the cautioners was willing to become bound [\*20] by himself.

"The lords assoilzied the defender."

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1. The judgment in the case of Edmonstone v. Lang was an erroneous one, in so far as it did not give effect to the circumstance, that possession of the subjects had been given on the faith of the improbativ obligation. If this had not been a circumstance of the case, the judgment would have been well founded. Accordingly, in the case of Brown v. Campbell, Nov. 28, 1794, the soundness of the judgment was called in question; and the opinion of the court was, that *rebus integris*, an informal cautionary obligation was not binding; but that in all cases where there had been a *rei interventus* the *locus pœnitentiæ* was barred, and that on that ground the case of Edmonstone v. Lang had been erroneously decided. In the case of Brown v. Campbell, the defender had signed an improbativ document, by which he bound himself to relieve the pursuer of all dam-

age he might sustain by becoming cautioner in a suspension for another party. On the Session Papers, Lord President CAMPBELL thus writes,—If matters stood in *nudis finibus contractus*, and the action was laid upon the writing alone, such action could not be maintained—the writing being improbate. But here the action is laid upon the fact, which fact admits of being proved *pro ut de jure*; or at least, if not by witnesses, certainly by oath of party, namely, that in consequence of the defender's interference, and granting this letter of relief, the pursuer became cautioner in the suspension, and was obliged to pay the debt. The latter was of the nature of a mandate, or an obligation of relief. The fact is admitted and matters are not entire.”—MS. Notes, Sir Ilay Campbell's Session Papers.

2. A similar judgment was pronounced in *Sinclair v. Sinclair*, Feb. 3, 1795, where the defender had signed an improbate document, by which he bound himself to see another party repaid a sum of money, which, on the faith of the cautionary obligation had been advanced by him. In that case Lord President CAMPBELL observed,—“I think the distinction that has been made is a sound one, that where a cautionary obligation is in *nudis finibus*, it may be resiled from; but where, as in this case, things are not entire, and a man assigns a [ \*21 ] debt upon an assurance, such as the pursuer \*received, it cannot be withdrawn. Had the conveyance by the pursuer not been granted, the obligation on the cautioner would have remained in *nudis finibus*; but the assignation was granted and the money received on the faith of the defender's letter, and it is now too late to retract. We must hold him as bound.”

3. Although the general rule of law in Scotland is, that a cautionary obligation must be constituted by a probative writing, the rule suffers an exception where the cautionary obligation is undertaken at the same time with the principal obligation, the principal obligation being itself one that can be established by witnesses. In such a case the cautionary obligation may be proved by witnesses also. In *Carruthers v. Bell*, Nov. 13, 1812, the pursuer brought an action against the defender, as cautioner, for the balance of the price of cattle sold by him to a third party, for whom the defender had become cautioner. The lord ordinary allowed the pursuer a proof of his averments *pro ut de jure*. The defender reclaimed and *pleaded*,—That a cautionary obligation was a *literarum obligatio*, and could only be proved by the writ or oath of the party. The court refused the petition without answers. Lord MEADOWBANK observed,—“It is for the public interest that cautionary obligations may be contracted along with the contract of sale, and entered into as incidents of it, and that it should be competent to prove them by parol evidence.”

4. In *Rhynd v. Mackenzie*, Feb. 20, 1816, the pursuer offered to prove, *pro ut de jure*, that two men had, by verbal contract, bought from him a quantity of barley, and that the defender, at the time of the bargain, had verbally become cautioner for the price. The defender *pleaded*,—That a cautionary obligation is a *literarum obligatio*, and could only be proved by the writ or oath of the cautioner. The pursuer replied, that when the cautionary obligation had been interposed at the time of the sale, and was an incident to it, a proof *pro ut de jure* was competent. The court allowed the proof.

5. Although a cautionary obligation, undertaken at the same time with the principal obligation, may be proved by parol evidence, when the principal obligation, itself may be proved in that manner, such evidence is not admissible to prove a cautionary obligation for future contractions. In *McEwan v. Crawford*, Feb. 13, 1816, a party was alleged to have become cautioner for future furnishings to another party, and being sued before the sheriff of Lanarkshire, he was found liable upon a parol proof being led in support of the allegation. The cautioner brought a suspension, but the lord ordinary found the letters orderly proceeded. The cautioner having reclaimed, the court unanimously altered, [ \*22 ] with expenses. *Observed on the Bench*,—“The cases cited by the respondent only establish, that parol evidence is competent to prove a cautionary obligation entered into at same time with a principal contract admitting of such proof; but there is no authority for sustaining such evidence to prove a cautionary obligation for future claims.”



IN SCOTLAND LETTERS OF GUARANTEE, GRANTED IN REFERENCE TO MERCANTILE TRANSACTIONS ARE SUSTAINED ALTHOUGH NEITHER HOLOGRAPH NOR TESTED.

### PATERSON v. WRIGHT.

Jan. 31, 1810.—S. F. C. 545. House of Lords, July 4, 1814.

PATERSON had made considerable furnishings of cotton-yarn to Simpson and Company. When they were in his debt to a considerable amount, and still wanted further furnishings, the following letter of guarantee was granted by Wright:—"Mr. Dugal Paterson, Glasgow.—Sir,—I hereby bind myself to see you paid for whatever purchases of cotton-yarn Messrs. J. Simpson and Co. have made or may make from you for 12 months to come from this date. I am, &c. (Signed) ADAM WRIGHT."

Simpson and Co. having become bankrupt, an action was brought against Wright for payment of the furnishings. He defended on various grounds. The letter was neither holograph nor tested in terms of the Act 1681. In so far, however, as it was a security for future furnishings, being clearly an obligation in *re mercatoria*, no doubt was entertained of its validity, and the lord ordinary's interlocutor, sustaining it to that extent, was acquiesced in. Considerable doubt however arose, whether it could be held as a valid cautionary obligation for the debt that had been contracted previous to its date.

*The Pursuer Pleaded*;—The exigencies of commerce require, and the favour shown to it, has granted an exemption from the usual solemnities to mercantile contracts and obligations. The present transaction took place between merchants, and related to merchandise. It cannot be disputed that the \*guarantee is effectual for furnishings posterior [ \*23 ] to its date; and there is no good ground for dividing an obligation which is all contained in one sentence. But though it were divided, there is no authority for saying that a guarantee for past furnishings is not an obligation in *re mercatoria*. The one is as often granted by merchants as the other, and no distinction is made in the forms. Had the obligation been undertaken by a bill, as often happens, the form would have been equally simple, and the validity could not have been disputed for an instant.

Supposing the distinction well-founded, and that the letter, considered in relation to the prior furnishings, is not entitled to the privileges of a writing in *re mercatoria*, it is, nevertheless, an effectual obligation. Writing is not essential to the constitution of a cautionary obligation, although such obligation can only be proved by the writing or oath of the party. In the Roman law, *fide jussio* is classed by every author among the *verborum obligationes*. From the following cases it clearly appears, that in our own law it is the same, and that writing is only necessary in *modum probationis*.—*Affleck v. Gordon*, 26th November, 1580; *Deuchar v. Brown*, 19th January, 1672; *Morrison's Diet.*, pp. 12382 and

12387; ——— v. Johnston, 7th Dec., 1687; Harcarse, No. 804; Crichton and Dowie v. Sime, 21st July, 1772. It only remains to inquire by what kind of writing the obligation is to be proved. It may be proved by a holograph writing without dispute, although the Statute 1681 makes no exception in favour of such. That statute, as its preamble bears, was enacted to guard against forgery and the lubricity of witnesses who had not signed. It has, therefore, never been held to apply to a holograph writing; and, by parity of reasoning, it does not apply to a missive letter where the truth of the signature is not disputed.—Fogo v. Milliken, 20th December, 1746, Kilk.; Crawford v. Wight, 16th January, 1739, Kilk.; Falconer, No. 149; Neil v. Andrew, 20th June, 1748, Kilk.; Henderson v. Murray, 5th December, 1765; and Brebner, 18th January, 1803.

In this case there has been a *rei interventus*, which will give validity to the letter. The credit of Simpson and Co. was doubtful; and had it not been for his dependence on the letter of guarantee, the pursuer [\*24] would not have gone on to make the extensive furnishings which he continued to do; on the contrary, he would have exacted payment of the former.

*Answered for the Defender;*—Under the statute law of Scotland, the writing founded on is unquestionably null. It is true, however, that practice has established certain exceptions to the rule laid down by the Act 1681. These exceptions are, 1st, holograph writings; 2d, mercantile documents. These last, with which only the present question is concerned, derive their validity *ex jure gentium*, and are not affected by the municipal laws of any particular state, because these laws cannot be known to foreigners. Hence bills of exchange and bills of lading were perhaps originally the only favoured documents, although the privileges have been extended to inland bills, and other transactions between inland merchants. Bills are always considered mercantile, in consequence of their peculiar form and origin; but where missive letters are used, they fall under the *lex mercatoria*, or the municipal law, according to the nature of the transaction concluded by them. In the present case, not the form, but the substance of the obligation is to be looked to. It is undoubtedly a real cautionary obligation, which cannot be constituted by an informal missive.—Crichton and Dowie v. Sime, 21st July, 1772.

It is not excepted from the general rule by falling under the *lex mercatoria*, neither being a usual transaction among merchants, nor (when it does occur) requiring that dispatch and simplicity necessary in their other transactions. One kind of cautionary obligation, it is admitted, comes under this law, namely, a letter of credit; but such letters uniformly relate to debts to be contracted posterior to their date. But a cautionary obligation for a debt previously due, and granted by a party resident in the same town with the debtor and cautioner, is an obligation of a very different nature, and not to be considered as falling under the same law. It is no mercantile transaction, being neither purchase nor sale, nor barter, nor commission; on the contrary, it is a transaction which the pursuer has ample time to reduce into a regular deed, and

which he should be cautioned by the requisite solemnities not to enter into rashly. \*Accordingly, our law construes it strictly, and affords relief, to a certain extent, by the septennial prescription. [\*25] In such a case, the municipal law assumes its force, and effect must be given to the provisions of the statute, which requires the solemnities, not merely to prevent forgery, but to guard men from hastily undertaking serious engagements.

It is said that a cautionary obligation in movables may be constituted by consent without writing, and may be afterwards proved by the writ or oath of the party. Perhaps this may be the case where there has been a *rei interventus*, where a transaction has taken place on the faith of the obligation. But the genius of our law being indisputably hostile to cautionary obligations, it lays down a different doctrine either where there has been no *rei interventus*, (if, as here, the money has been previously advanced without security,) or where (as is the case here also) it has been *pars contractus* to reduce the obligation into writing, in which case it is held not to be completed till a valid and probative writing be executed.

It has been argued for the pursuer, that the obligations to an improbativ writing are removed if the grantor does not deny his subscription; some countenance had at one time been given to this doctrine by a few of the cases quoted, but after considerable discrepancy in the decisions, the matter was most fully argued by a hearing in presence, and solemnly decided in contradiction to his plea.—*M'Farlane v. Grieve*, 22d May, 1790. In the later cases, where an informal writing has been sustained, it has only been on the ground of homologation or *rei interventus*. This observation particularly applies to the case of *Brebner*; although it does not sufficiently appear from the report, there having been a printed pleading on one side only.

Lastly, the pursuer attempts to bring his case under the description of those where there has been a *rei interventus*, but there is no ground for such an argument, the goods having been sold and delivered, and the credit given, before the letter was granted.

The lord ordinary pronounced the following interlocutor:—"Finds, that the letter founded on by the pursuer, is not a \*letter in *re mercatoria*, in so far as regards the furnishings made to Simpson and Company, prior to the date of it, but is a proper cautionary obligation for payment of a debt already due: Finds that the letter is a sufficient guarantee for the subsequent articles of the account, which were all furnished within twelve months of the date thereof: Find the first two articles of the account, furnished prior to the date of the letter, amount together to the sum of £229, 17s. 5d. sterling: sustains the defences pleaded for the said defender, and assoilzies him from the action, in so far as regards these two articles."

The pursuer reclaimed; and his petition having been answered, the court, by the narrowest majority, at first adhered to the interlocutor. The case came back on a reclaiming petition, which, with answers, was advised by a full bench.

Lord NEWTON said that he continued of the same opinion which he

had formed as ordinary in the cause. He thought a cautionary obligation for a debt past due an *obligatio literarum*, which is only effectual when reduced into a probative writing. The two cases reported by Lord Kilkerran pointed against this doctrine; but he considered it as good law ever since the decision was pronounced in the case of Sime, in which he had been counsel. The next question was, whether this is an obligation in *re mercatoria*? As to the future furnishings, it certainly is. But in so far as it relates to past furnishings it is not. And there is good ground for the distinction; because when a guarantee intervenes in a present or for a future transaction, there is no time or opportunity for a regular cautionary obligation. But when the debt is already due, there is no such haste; and, by requiring a regular deed, the parties have time to deliberate. By affording this time to the cautioner, no creditor can be injured, because he has already given credit to the debtor without security.

Lord CULLEN concurred in this opinion.

[\*27] Lord MEADOWBANK was of opinion, that the interlocutor of \*the lord ordinary ought to be altered. The law of Scotland bends to the *lex mercatoria* for the facility of commerce; and on this principle, there is strong reason to doubt the judgment. A letter of guarantee is as often given on account of a transaction finished, as on account of future furnishings; because a person will often furnish no more unless he is guaranteed for payment of what he has already advanced. This is done every day by bills and by ordinary letters in *rebus mercatoriis*; and it would be most detrimental to commerce to require regular writings in transactions of frequent occurrence. By a bill which is neither holograph nor tested, a cautionary obligation might undoubtedly have been undertaken; and there is no very good reason why it should not by a missive letter. But this case is still stronger,—of two obligations, (one of them confessedly valid,) both are contained in the same sentence. The second never would have been acted upon without the first. It extended credit to the future transactions. There is, therefore, a *rei interventus*. The guarantee of the past was relied upon when credit was given for the future.

Lords POLKEMMET and GLENLEE concurred in thinking a guarantee for furnishings a transaction in *re mercatoria*. There was no other rule of judging in the present case than to consider whether the mercantile dealings would have gone on without it. It rather appears they would not. There was nothing more natural than for a party who had made furnishings, and had hitherto got regular payments, when these payments failed, to require a guarantee for what he had already furnished, before he would furnish any more.

The LORD JUSTICE-CLERK said that he concurred in the principle of law with Lord Newton. He thought that a cautionary obligation for a debt already due, was an *obligatio literarum*, which could only be perfected by a regular deed. It was not such a transaction in *re mercatoria*, as to require the solemnities of the statute to be dispensed with, because parties had abundance of time to complete it in proper form; and it was the meaning of the statute, that ample time for deliberation

should be given before an obligation of the kind was entered into. On that ground he had at first been inclined to affirm the lord [\*28] ordinary's judgment; but on reconsidering the matter, he did not think it applied to the particular case. The two obligations in the letter were very much interwoven, and it was doubtful whether they could at all be separated. It was matter of opinion whether, without caution for the past, the dealings would have gone on. He rather thought they would not. And on the ground, that it was only because the past furnishings were secured that the future were given, he was for altering the interlocutor.

The court accordingly altered their interlocutor, and gave judgment for the pursuer, (4th July, 1809;) to this judgment they adhered on advising a reclaiming petition with answers, all the judges remaining of the opinions already delivered.

The defender having appealed to the house of lords, the judgment was affirmed.

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WHERE THERE ARE DIFFERENT CAUTIONERS FOR THE SAME DEBT, THEY ARE ALL ENTITLED TO A PROPORTIONATE RELIEF FROM ONE ANOTHER, WHETHER THEY ARE BOUND IN ONE DEED OR IN SEPARATE DEEDS, UNLESS IT SHALL BE MADE TO APPEAR THAT SOME OF THEM BECAME BOUND FOR THE RELIEF OF THE OTHER CAUTIONERS, IN WHICH CASE THESE ARE ENTITLED TO A TOTAL RELIEF.

## I.—DEERING v. THE EARL OF WINCHELSEA.

Feb. 8, 1787.—E. 2 Bos. & Pull. 270.

THOMAS DEERING, younger brother of the plaintiff, was appointed in 1778, receiver of fines and forfeitures of the customs of the outports, and entered into three bonds, each in the penalty of £4000, with condition for duly accounting; in one of which the plaintiff joined as surety, in another Lord Winchelsea, and Sir John Rous in the third. Thomas Deering became insolvent and left the country; the balance due to the crown was £6602, 10s. 8d., part of which was levied on his effects, and when the bill was filed there was due £3883, 14s. 8½d., which was rather less than the penalty of each of the \*bonds. The bond [\*29] in which the plaintiff had joined was put in suit against him, and judgment obtained. He filed his bill, demanding contribution against Lord Winchelsea and Sir John Rous, and praying an account of what was due to the crown, and money levied on the plaintiff, (supposing execution to follow the judgment,) and that Lord Winchelsea and Sir John Rous might contribute to discharge the debt of Thomas Deering, as two of the sureties for that debt. The appointment, the three bonds, and the judgment against the plaintiff, were in proof, and the balances were admitted by all parties.

Lord Chief Baron EYRE, after stating the case, observed,—That contribution was resisted on two grounds ; first, that there was no foundation for the demand in the nature of the contract between the parties, the counsel for the defendants considering the title to contribution as arising from contract expressed or implied ; secondly, that the conduct of Sir Edward Deering had deprived him of the benefit of any equity which he might have otherwise had against the defendants.

His lordship considered the second objection first. The misconduct imputed to Sir E. Deering, was that he had encouraged his brother in irregularities, and particularly in gaming, which had ruined him, and had done this knowing his fortune to be such that he could not support himself in his extravagances and faithfully account to the crown ; that Sir E. Deering was privy to his brother's breaking through the orders given him to deposit the money he received in a chest under the key of the comptroller. His lordship observed that this might be true, and certainly put Sir E. Deering in a point of view which made his demand indecorous ; but it had not been made out to the satisfaction of the court that this constituted a defence. Mr. Maddocks had stated that the author of the loss should not have contribution ; but stated neither reason nor authority to support the principle he urged. If these were circumstances which could work a disability in the plaintiff to support his demand, it must be on the maxim, “that a man must come into a court of equity with clean hands ;” but general depravity is not sufficient. It [ \*30 ] must be pointed to the act \*upon which the loss arises, and must be, in a legal sense, the cause of the loss. In a moral sense, Sir E. Deering might be the author of the loss ; but in a legal sense Thomas Deering was the author ; and if the evil example of Sir E. Deering led him to it, yet this was not what a court of justice could take cognizance of. There might indeed be a case in which a person might be, in a legal sense, the author of the loss, and therefore not entitled to contribution ; as if a person on board a ship was to bore a hole in the ship, and in consequence of the distress occasioned by this act it became necessary to throw overboard his goods to save the ship. This head of defence therefore fails. The real point is, Whether there shall be contribution by sureties in distinct obligations ?

It is admitted, that if they had all joined in one bond for £12,000, there must have been contribution. But this is said to be on the foundation of contract, implied from their being parties in the same engagement, and here the parties might be strangers to each other. And it was stated that no man could be called upon to contribute who is not a surety on the face of the bond to which he is called to contribute. The point remains to be proved that contribution is founded on contract. If a view is taken of the cases, it will appear that the bottom of contribution is a fixed principle of justice and is not founded in contract. Contract, indeed, may qualify it as in *Swain v. Wall*, 1 Ch. Rep. 149, where three were bound for H. in an obligation, and agreed if H. failed, to bear their respective parts. Two proved insolvent, the third paid the money, and one of the others becoming solvent, he was compelled to pay a third only.

There are in the Register, fol. 176, b., two writs of contribution, one,

"*De contributione facienda inter cohæredes*," the other "*De feoffamento*;" these are founded on the Statute of Marlebridge, 52 H. III., c. 9, which enacts, "that if any inheritance, whereof but one suit is due, descends unto many heirs as unto parceners, whoso hath the eldest part of the inheritance, shall do that one suit for himself and fellows, and the other co-heirs shall be contributaries according to their portion for doing such suit. And if many feoffees be seized of an inheritance, whereof but one suit is due, the lord of the fee shall \*have but that one suit, and shall not exact of the said inheritance but that one suit [\*31] as hath been used to be done before. And if these feoffees have 'no warrant or means which ought to acquit them, then all the feoffees, according to their portion, shall be contributaries for doing the suit for them." The object of the statute was to protect the inheritance from more than one suit. The provision for contribution was an application of a principle of justice. In Fitzh. N. B. 162, B, there is a writ of contribution where there are tenants in common of a mill, and one of them will not repair the mill, the other shall have the writ to compel him to contribute to the repair. In the same page, Fitzherbert takes notice of the writs of contribution between co-heirs and co-feoffees; and supposes that between feoffees the writ cannot be had without the agreement of all, and the writ in the register countenances the idea; yet this seems contrary to the express provision in the statute. In Sir Wm. Harbet's case, 3 Co. 11, b, many cases are put of contribution at common law. The reason is, they are all *in æquali jure*, and as the law requires equality, they shall equally bear the burden. This is considered as founded in equity; contract is not mentioned. The principle operates more clearly in a court of equity than at law. At law the party is driven to an *audita querela* or *scire facias* to defeat the execution, and compel execution to be taken against all. There are more cases of contribution in equity than at law. In Equity Cases Abridged, there is a string under the title "Contribution and Average." Another case at law occurred in looking into Hargrave's Tracts, in a treatise ascribed to Lord Hale on the prisage of wines. The king's title is to one ton before the mast and one ton behind the mast. If there are different owners they may be compelled in the exchequer chamber to contribute. Contribution was considered as following the accident on a general principle of equity in the court in which we are now sitting.

In the particular case of sureties, it is admitted that one surety may compel another to contribute to the debt for which they are jointly bound. On what principle? Can it be because they are jointly bound? What if they are jointly and severally bound? What if severally bound by the same or \*different instruments? In every one of those cases sureties have a common interest and a common burthen. They [\*32] are bound as effectually *quoad* contribution, as if bound in one instrument, with this difference only, that the sums in each instrument ascertain the proportions, whereas if they were all joined in the same engagement, they must all contribute equally.

In this case Sir E. Deering, Lord Winchelsea, and Sir J. Rous were all bound that Thomas Deering should account. At law all the bonds

are forfeited. The balance due might have been so large as to take in all the bonds; but here the balance happens to be less than the penalty of one. Which ought to pay? He on whom the crown calls must pay to the crown: but as between themselves they are *in æquali jure*, and shall contribute. This principle is carried a great way in the case of three or more sureties in a joint obligation; one being insolvent, the third is obliged to contribute a full moiety. This circumstance, and the possibility of being made liable to the whole, have probably produced several bonds. But this does not touch the principle of contribution where all are bound as sureties for the same person.

There is an instance in the civil law of average, where part of a cargo is thrown overboard to save the vessel, *Show. Parl. Cas., 19 Moor, 297.* The maxim applied is *qui sentit commodum sentire debet et onus*. In the case of average there is no contract express or implied, nor any privity in an ordinary sense. This shows that contribution is founded on equality, and established by the law of all nations.

There is no difficulty in ascertaining the proportions in which the parties ought to contribute. The penalties of the bonds ascertain the proportions.

The decree pronounced was, that it being admitted by the attorney-general, and all parties, that the balance due was £3883, 14s. 8½d., the plaintiff, Sir E. Deering, and the defendants, the Earl of Winchelsea and Sir J. Rous, ought to contribute in equal shares to the payment thereof, and that they do accordingly pay each £1294, 11s. 6¼d., and on payment the attorney-general to acknowledge satisfaction on the record [ \*33 ] of the judgment against the plaintiff, and the two bonds entered into by the Earl of Winchelsea and Sir J. Rous to be delivered up.

This being a case which the court considered as not favourable to Sir E. Deering and a case of difficulty, they did not think fit to give him costs.

## II.—CRAYTHORNE v. SWINBURNE.

July 23, 1807.—E. 14 Vesey, 160.

HAMERSLEY AND Co., bankers, being creditors of Henry Swinburne, and calling in their money, an application was made by Sir John Swinburne, the nephew of Henry Swinburne, to the Newcastle Bank, who advanced the money upon the security of two bonds; one the joint and several bond of Henry Swinburne as principal, and Craythorne as surety, for £1200; the other by Sir John Swinburne, reciting the former bond, and the advance of the money to Henry Swinburne and Craythorne, at the request of Sir John Swinburne, with condition to be void on payment by Henry Swinburne and Craythorne, or either of them. The £1200 advanced was applied accordingly in discharge of the debt to Hamersley and Co. Afterwards Henry Swinburne died abroad insolvent; and Craythorne, having paid the whole sum, filed the bill, praying



contribution by Sir John Swinburne, who insisted that he was not a co-surety with the plaintiff, but merely a collateral security to the bank in default of payment by Henry Swinburne and Craythorne, and offering evidence of his conversation with one of the partners in the bank, stating their objection to the security of Henry Swinburne and Craythorne, and requiring, as the condition of the advance, a bond from Sir John Swinburne to pay the money, in case they should not pay it.

Sir *Samuel Romilly* and Mr. *Wear* for the plaintiff;—This is a plain case for compelling contribution by this defendant, as \*a co-surety with the plaintiff. The court looks to the real transaction; therefore, whether they are sureties by one or by several instruments is immaterial; the liability depending upon, not the form, but the essence of the contract. In the case of *Deering v. The Earl of Winchelsea*, 2 Bos. & Pull. 270, three joint and several bonds were given by Thomas Deering and each surety separately, that Thomas Deering should duly account to the crown; and it was held that the circumstance, that the bonds were distinct, could not make a difference. The evidence in this cause proves, that the whole of this sum of £1200 was advanced to Henry Swinburne, and the plaintiff had no part of it, being merely a co-surety, as well as Sir John Swinburne, whose bond recites, that the advance of the bank for his uncle's benefit was at the special instance and request of Sir John Swinburne. [\*34]

Mr *Richards* and Mr. *Bell*, for the defendants, relied upon the circumstances as distinguishing this case from that in the Court of Exchequer; observing, that previously to that decision the point was a subject of much doubt, and upon that authority it would not have been prudent to abstain from parole evidence.

Sir *Samuel Romilly* in reply;—This case stands upon a firm foundation. The whole doctrine of principal and surety, with all its consequences of contribution, &c., rests upon the established principles of a court of equity, not upon contract, except as it may be so represented upon the implied knowledge of those principles. There is no express contract for contribution; the bonds generally, if not universally, being joint and several, creating several obligations by each. The contribution results from the maxim, that equality is equity; proceeding where the instruments are several, very much upon this, that a surety will be entitled to every remedy, which the creditor has against the principal debtor, to enforce every security and all means of payment, to stand in the place of the creditor not only through the medium of contract, but even by means of securities, entered into without the knowledge of the surety, having a right to have those securities transferred to him, though there \*was no stipulation for that, and to avail himself of all those securities against the debtor. This right of a surety also [\*35] stands, not upon contract, but upon a principle of natural justice; the same principle upon which one surety is entitled to contribution from another. The creditor may resort to either for the whole, or to each for his proportion; and, as he has that right, if he from partiality to one surety will not enforce it, the court gives the same right to the other surety, and enables him to enforce it. Natural justice requires that the

surety, having become security with others, shall not have the whole thrown upon him by the choice of the creditor not to resort to remedies in his power, the effect of which would be an equal contribution. That being the principle for enforcing contribution, established by authority in the case of *Deering v. The Earl of Winchelsea*, there can be no difference, whether they become sureties by one or by different instruments, or whether a surety knew at the time, that he was co-surety with others; distinctions which must determine the extent of liability, if it arose from contract.

The question then is, whether this case contains another distinction, that this defendant's engagement was to be surety for the plaintiff, the other surety, not for the principal debt; that the defendant was a surety only in default of payment by the plaintiff, whether that appears upon the face of the instrument, or can be established by evidence, and whether parole evidence can be received. There was certainly an omission in not making this bond void upon the payment of the debt. It would still be absolute at law, though the money might have been paid by Sir John Swinburne; but there can be no doubt that is an omission, and the intention was, that the bond should be void by the payment at any day by him as well as by the other two. Though the bonds treat them all as principals, the fact is admitted, that Henry Swinburne was the only principal, and the other two were sureties; and then upon established principles one surety has a right to call upon the other to contribute equally with himself, or to compel the creditor, the instant the day was past and the bonds were absolute, to enforce both bonds against both, not only one. The evidence produced to prove that this [ \*36 ] defendant was a surety only in default of payment \*by the plaintiff cannot be received. It consists only of declarations, to which the plaintiff was no party, and made in his absence. Upon the whole, this case has no distinction from the common case of co-sureties.

The LORD CHANCELLOR.—Before the final decision of this case I wish to have the register's book examined, to see what was done in a case that occurred in Trinity Term, 1706, *Cooke*, 2 Freem. 97.

Upon the relation of principal and surety some things are very clear. It has been long settled, that if there are co-sureties by the same instrument, and the creditor calls upon either of them to pay the principal debt, or any part of it, that surety has a right in this court, either upon a principle of equity or upon contract, to call upon his co-surety for contribution; and I think that right is properly enough stated as depending rather upon a principle of equity than upon contract; unless in this sense, that the principle of equity being in its operation established, a contract may be inferred upon the implied knowledge of that principle by all persons, and it must be upon such a ground, of implied assumpsit, that in modern times courts of law have assumed a jurisdiction upon this subject; a jurisdiction convenient enough in a case simple and uncomplicated, but attended with great difficulty where the sureties are numerous, especially since it has been held—*Cowell v. Edward*, 2 Bos. & Pull. 268—that separate actions may be brought against the different sureties

for their respective quotas and proportions. It is easy to foresee the multiplicity of suits to which that leads.

But whether this depends upon a principle of equity, or is founded in contract, it is clear a person may by contract take himself out of the reach of the principle, or the implied contract. In the case of *Deering v. the Earl of Winchelsea*, which I recollect was argued with great perseverance, persons, not united in the same instrument, were made to contribute; and it was decided, that there is no distinction, whether they are bound in the same obligation or by several instruments. That case also established, that though one person becomes a surety without the knowledge of another surety, that circumstance \*introduces no distinction. If the relation of surety for the debtor is formed, [\*37] and the fact is not, that the party becomes surety for both the principal debtor and another surety, not for the principal alone, it is decided, that whether they are bound by several instruments or not, whether the fact is or is not known, whether the number is more or less, the principle of equity operates in both cases, upon the maxim that equality is equity; the creditor, who can call upon all, shall not be at liberty to fix one with payment of the whole debt; and upon the principle, requiring him to do justice, if he will not, the court will do it for him.

When once it is admitted, as it was in that case, that a man may by contract place himself out of the reach of the principle, you must in every case consider whether the party has done so. It was admitted in that case, that one bond being for £10,000, and the surety having paid it, Lord Winchelsea having executed a bond for £4000 only, though he was a surety, yet he had by contract taken himself out of the reach of the £6000, and was liable only to the extent of £4000. It must then be admitted, that if one surety can provide that another shall have no demand against him for a moiety of the debt, he may also contract, that the other shall have no demand whatsoever against him.

The question then is, whether the meaning of this instrument, executed by the defendant, is, that he will be a co-surety, or that the surety in the former instrument was, with reference to him, to be considered a principal. If the real nature of the transaction is to be understood thus, that Henry Swinburne and the plaintiff entered into a bond for £1200 to the Newcastle Bank, Swinburne as principal, and the plaintiff as surety, and Sir John Swinburne, who had no communication, as it appears, with them, proposed to the bank that he should become a co-surety, there is an end of the question; but, if not constituting himself co-surety with the plaintiff, he proposed to the bank only, that he would engage to pay them if they could not get payment from either of the others, then he has by contract withdrawn himself from the reach of the principle; and the plaintiff cannot complain, as the transaction was without his knowledge, that the defendant bound himself only to the extent he thought proper.

\*With an opinion upon this point, I do not however choose to decide it without an inquiry as to that case in *Freeman*, which [\*38] if it was decided, is a strong case, as there could be no doubt, whether the second security was to be considered a collateral security; and, there-

fore, there could be no question whether the party meant to be a co-surety, or only to give, as is contended in this instance, a collateral security.

The LORD CHANCELLOR.—Before I delivered the opinion I had formed upon this, I desired to have the register's book examined as to the case in *Freeman, Cooke*, 2 *Freem.* 97, which occurred to me, with the view of being enabled to determine whether it was the opinion of the master of the rolls of that day, or had the authority of a judgment, when such a question as this was before him. I cannot find that any such judgment appears in the register's book. I must therefore take it to be only a declaration of the opinion of the master of the rolls upon the point; a declaration undoubtedly of great weight, and deserving great attention. It is therefore my duty upon a case, in its circumstances perfectly new, to deliver my own opinion.

I take the case to be this, that Henry Swinburne was the only original debtor to Hamersley and Co., who called for their money; and it therefore became necessary for him to raise the money elsewhere. Sir John Swinburne appears to have applied to the bank at Newcastle; and according to the proposal made to those bankers, the sum of £1200 was to be raised upon the credit of Henry Swinburne and the plaintiff, to be applied to discharge the debt of Hamersley and Co. In that transaction so proposed, Henry Swinburne was to be the principal, and the plaintiff the surety. The Newcastle Bank, upon a discussion that took place between them and Sir John Swinburne, intimated their dislike to deal upon the security of Henry Swinburne, and that they were not satisfied to deal upon the security of both him and Craythorne. One bond was executed and tendered to the bank, in which Henry Swinburne, as principal, and Craythorne, as surety, are jointly and severally bound for the sum of £1200. Another bond was executed in consequence of some conversation between the bank, by one of \*the partners, and Sir John [ \*39 ] Swinburne, which I think is admissible evidence. The cause may be decided without reference to that question; but as it has an effect upon my mind, it is proper that parties should know that. The substance of that communication is, that the house did not like to trust to the security of Henry Swinburne and Craythorne; but if Sir John Swinburne had a good opinion of the credit that might be given, if not to Henry Swinburne, to Craythorne, and would become security to the bank that he would pay, if they did not, by entering into a bond to pay the debt, if they did not pay it, the bank would advance the money.

The sum of £1200 was advanced accordingly; the bond executed by Sir John Swinburne, reciting the former bond for money advanced to Henry Swinburne and Craythorne, and the condition is, that it shall be void if Henry Swinburne and Craythorne, or either of them, pay the money; and the banker says he understood it to be a collateral security, by which he means a supplemental security.

The question is, first, Whether Sir John Swinburne is, under this instrument, to be considered as a co-surety with Craythorne, or whether the effect is, that Sir John Swinburne did not undertake to stand as a co-surety with Craythorne, but was surety for both; to pay only if both should make default? It must be considered as entirely clear of any

objection, that Craythorne could take, that Sir John Swinburne was not at liberty to deal thus, as the proposition to the bank was, that Henry Swinburne and Craythorne were to be their debtors, and Sir John Swinburne, voluntarily adding his security, cannot be bound beyond the extent to which he thought proper to bind himself.

It was contended for the first time in *Deering v. The Earl of Winchelsea*, 2 Bos. and Pull. 270, that there is no difference whether the parties are bound in the same or by different instruments, provided they are co-sureties in this sense for the debt of the principal; and farther, that there is no difference, if they are bound in different sums, except that contribution could not be required beyond the sums for which they had become bound. I argued that case, and was much dissatisfied with the whole proceeding and with the judgment; but I have \*been since convinced, that the decision was upon right principles. [\* 40] Lord Chief Justice Eyre in that case decided, that this obligation of co-sureties is not founded in contract; but stands upon a principle of equity; and Sir Samuel Romilly has very ably put, what is consistent with every idea, that after that principle of equity has been universally acknowledged, then persons, acting under circumstances to which it applies, may properly be said to act under the head of contract, implied from the universality of that principle. Upon that ground stand the jurisdiction assumed by courts of law; a jurisdiction attended with great difficulty, where there are many sureties, though not in the simple case where there are only two, one of whom may bring his action for a moiety upon the implied undertaking. But whether this stands upon contract or a principle of equity, it is clear, that a party may take care by his engagement that he shall be bound only to a certain extent. That is proved by the case of *Swain v. Wall*, 1 Rep. Ch. 80, where the engagement being to pay in thirds, that contract was held to take them out of the principle, that would have required a moiety; and also by *Deering v. The Earl of Winchelsea*, where it was admitted that Lord Winchelsea, though liable as a surety, had by contract withdrawn himself from any liability, by virtue of which he should be charged beyond £4000.

If, therefore, by his contract a party may exempt himself from the liability, or that extent of liability, in which, without a special engagement he would be involved, it seems to follow, that he may by special engagement contract so as not to be liable in any degree. That leads to the true ground, the intention of the party to be bound, whether as a co-surety, or only if the other does not pay; that is, as surety for the surety, not as co-surety with him. As to the bond itself, it is clear upon the face of this bond, and according to its language, that the bank and Sir John Swinburne, if at liberty to do so, did consider that this sum of money was to be an advance as between Sir John Swinburne and the bank to the other two. They have no right to complain of it, for there is no contract by Sir John Swinburne with the other two; he might limit his engagement with reference to them as he thought proper; and \*the bond upon the face of it makes him surety only for the [\* 41] principal and the other surety. But it is clear upon the parole evidence, and why is not that competent evidence? Evidence is admitted to show

who is the principal and who the surety; and, in order to determine that, to show to whom the money was advanced; and why is it not to be admitted to show to whom the money was advanced as between Sir John Swinburne and the others? But this goes farther; for the evidence is, not in contradiction to, but in support of the instrument; and whether the demand is founded upon the equity only, or upon the implied contract, why should not evidence be admitted to show that the equity ought not to be applied, and the contract ought not to be inferred?

I do not state that the circumstance, that Sir John Swinburne entered into this security without the knowledge of Craythorne, would have repelled the doctrine of contribution, as that stands upon this, that all sureties are equally liable to the creditor, and it does not rest with him to determine upon whom the burthen shall be thrown exclusively, that equality is equity; and if he will not make them contribute equally, this court will finally by arrangement secure that object. But then the question comes round, whether that is according to the contract or engagement of the surety? My opinion is wrong if Sir John Swinburne is a co-surety. Having considered this much, and given great attention to the case in *Freeman*, I think he is not a co-surety; but, as between him and Craythorne, the latter is just as much a principal as Henry Swinburne. The consequence is, that the equity does not apply, Sir John Swinburne being liable only in case the other two do not pay, and not being liable with them.

This bill, therefore, must be dismissed, but without costs.

[\*42]

### \*III.—SMITON v. MILLER.

Nov. 15, 1792.—S. Morr. 2138.

ARCHIBALD MILLER having obtained a credit with the British Linen Company for £800, a bond was granted by him, Patrick Miller, John Walker, and other two obligants, whereby they became bound, jointly and severally, to repay to the bank whatever sums should be drawn out by Archibald Miller on that credit.

John Walker died. And the bank having desired another cautioner in his place, a bond of corroboration was granted by the principal debtor and Walter Smiton.

Archibald Miller died bankrupt, and nearly £700 in debt to the bank on this credit.

Walter Smiton upon this pursued the cautioners in the original bond for a total relief. None of them appeared but Patrick Miller, who, on the other hand, contended, that Smiton must bear an equal share of the loss with them.

*Pleaded for Defender*;—Mr. Smiton joined in the bond of corroboration, solely in order to obtain a further indulgence to his friend the common debtor.

Where a person who has granted an obligation with cautioners, renews the same with different cautioners, without referring to the former obli-

gation, the cautioners in the last have no claim of relief, either total or partial, against those in the first. And it appears difficult to find a good reason why the debtor and his new co-obligant, merely by calling the last a bond of corroboration, should have it in their power to subject the cautioners in the original bond to so important an obligation as that of relief, especially as the reference to the first bond is commonly that of the creditor, whose object is not to regulate the relief among the parties, but to preclude any presumption that he has passed from the original bond. It seems, therefore, to be going far enough to allow the cautioners in the last bond a proportional relief, and to this the granters of the original bond may be held to have consented, as they derive an advantage by having the burden divided among a greater number.

\*In practice, the court have sometimes made a distinction between the case where the new cautioner grants the bond of cor- [\*43] roboration by himself, and that where he is joined in it by the principal debtor. In the former case, he is held to be cautioner for the original obligants, having right to be totally relieved; in the latter, as an additional cautioner along with the rest, and only entitled to a proportional relief: 18th December, 1701, *Loch v. Lord Nairne*; February, 1685, *Ker v. Gordon*; 15th December, 1722, *Murray v. Creditors of Orchardton*. But in the case, 23d February, 1671, *Arnold v. Gordon*, a partial relief only was found due to a cautioner, even where he was joined by none of the former obligants. See all these cases *voce Solidum et pro rata*.

*Pleaded for Pursuer*;—The original obligants were all jointly bound in the first bond for the whole debt, and Mr. Smiton did not enter into the second with any view to lessen the extent of their obligation, but merely to grant an additional security to the banking company. He, therefore, did in fact become cautioner for all of them, and of consequence they are liable *singuli in solidum* to him in total relief. If the new bond had been signed by Mr. Smiton only, or if, instead of granting it, he had paid the balance due to the bank and taken an assignment, he would have been entitled to a total relief; and there seems to be no reason why he should in the present case be in a worse situation: *Erskine*, b. 3, tit. 3, § 69; 1st December, 1703, *Clarkson v. Edgar*, *voce Solidum et pro rata*; 14th February, 1705, *Brock v. Lord Bargeny*, *ibidem*; 10th July, 1745, *Mirrie v. Pollock*, *Morr.* 2125.

The lord ordinary had found Smiton entitled to a total relief.

The court altered the interlocutor, and found, “That Miller was only liable to relieve Smiton of a proportional part of the debt due to the British Linen Company, along with the other obligants in the original bond of credit.”

Lord Justice-Clerk M<sup>Q</sup>UEEN said,—This is a general and [\*44] \*important question. The decisions have not differed; they all tend to one general rule, and this rule is founded in common sense, that where a new surety engages on account of the principal debtor, and for the purpose of saving him from diligence, there is nothing that ought to difference his case from that of the cautioners in the original obligation; they are all cautioners for the principal debtor. There is another case, where the principal and cautioners are distressed, and a person inter-

poses to relieve them. It is clear that this person interposes for them all, and that, with regard to him, they are all principal debtors; and consequently, when he pays the debt, he has a claim for a total relief against the whole. The analogy of the law in other matters confirms me in the opinion which I have formed. Thus, it often happens, that where a security is given over a particular subject, the creditor demands a further security, and other lands are added to those over which the creditor's security formerly extended. There can be no question here, as long as these subjects remain the property of the debtor. But I shall suppose them to be sold to different purchasers, and that the creditor comes to demand his payment from the purchaser of the last property. "Why attack me?" says the purchaser. "Make your demand rather from that subject over which you were first secured, or, at least, divide the demand." The creditor answers, "I will not divide my payment;" and so the purchaser of the last subject must pay. But then he is entitled to a conveyance; and he comes against the estate over which the debt originally extended, and he ranks on it *pro rata* according to the respective values of the two. There are many cases to the same purpose; as for example, the case of catholic creditors and secondary creditors. The doctrine applies to all of these cases. The secondary creditor has no right to a total relief, but to a proportional one; and these considerations strengthen in my mind the principle which I think ought to regulate this case. Cautioners are often hurt by lenient creditors, who, by accepting of new cautioners, enable the debtor to enlarge his debt. In this case no favour whatever was done to the other cautioners by the interposition of Smiton, the additional cautioner; and they must be [\*45] entitled to relief against him, just in the same way as if his \*cautionary obligation had been contained in the same bond with theirs.

LORD DREGHORN.—*Ex facie* the cautioners are principals in the original bond. But Smiton's obligation is in the same terms, and he must therefore have known that they were cautioners.

LORD SWINTON.—Put the case, that in place of joining in a bond of corroboration, Smiton had paid the debt, would he not have been entitled to recourse upon the cautioners in the original bond? If so, the bond of corroboration is not in the same situation with the original bond. It appears to me to place Smiton in the same situation as if he had paid the debt. The former cautioners ought to be held as all principals to Smiton.

LORD PRESIDENT CAMPBELL.—If Lord Swinton were right in the view which he has taken of these bonds, the case would come to the same point with that of M'Dowall of Canonmills, where there were two sets of cautioners, and the question came to be, whether the new bond superseded the old one? Your lordships ultimately thought that it did, and that the original cautioners were free. But this is a different case; it is one of those questions where the general rule of law is, that all cautioners have a claim *pro rata*, whether they be bound in one or more deeds, seeing they are all bound for behoof of, and at the request of the principal debtor alone. This is the general rule; and yet it may appear



from circumstances, that the new obligation has been entered into on account of the cautioners, as well as on account of the principal; and then there is an exception from the general rule, and the new cautioners have a relief from those for whose benefit they became bound. Here there are two sets of cautioners; the second was bound not for the cautioners, but for the principal; and, therefore, in deciding betwixt them, they must be entitled to relief *pro rata*.

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\*IV.—LENNOX v. CAMPBELL. [ \*46 ]

May 18, 1815.—S. F. C. 359.

In 1793, John Lennox of Antermomy, Alexander Lennox of Gielston, and Robert Lee, merchant in Greenock, granted bond, jointly and severally, as principals to the Bank of Scotland, for a cash credit to the amount of £600. Mr. Lee was, however, in fact, the principal debtor.

In 1802, Lennox of Gielston died, and the bank demanded a bond of corroboration from an additional party.

Mr. Campbell then granted a bond of corroboration, which, after reciting the original bond, proceeds as follows:—"Seeing the said directors are willing to continue the said credit, upon my becoming a principal, jointly and severally bound for the said credit, therefore I, the said Archibald Campbell, hereby not only corroborate the bond above narrated, but also, as a principal concerned in the said credit, bind and oblige me, conjunctly and severally, with the obligants in the said bond above named, &c., to pay the said sum of £600, or such part thereof as the said Robert Lee shall happen to value for hereafter, or that he has already uplifted from the said bank; and renouncing hereby all benefit of discussion of the debts which may seem to arise from priority of obligation amongst us, and all other objections whatever proponable in law against these presents."

Mr. Campbell did not take any letter of relief from Mr. Lee.

In 1804, Lennox of Antermomy having died, the bank obtained a bond of corroboration from Mr. Still.

At the death of Mr. Lee in 1806, a balance was due to the bank. The representative of the Lennoxes, on a demand by the bank, paid the sum, took an assignation to the bonds, and raised an action against Mr. Campbell and Mr. Still, as being joint cautioners, and bound to relieve the pursuers *pro rata* of the loss sustained by the cautionary obligation. He referred to Arnold v. Gordon, February 21, 1671; Murray v. Orchardton's Creditors, December 15, 1722, Kames; Kerr v. Gordon, February, 1685, Harcase, 58; Loch and Strathallan v. Lord Nairn, December 18, 1701; Godfrey v. Quesney, December 3, 1717; Lockhart v. Lord Semple, December 19, 1738, Elchies, \*No. 916; Merry v. Pollock, July 10, 1745, Kilkerran; Smiton v. Miller, November 15, 1792; Sir John Callender v. The Commercial Banking Company of Aberdeen; Smith v. Ogle, December 11, 1811. [ \*47 ]

The pursuer having died, the action was insisted in by his representatives.

No appearance was made for Mr. Still, who was bankrupt; but Mr. Campbell answered,—That he was guarantee for, and not with the cautioners, and therefore was entitled to total relief. He rested on Erskine, b. iii. tit. 3, § 69, and drew the distinction between the present case and the leading decisions on which the pursuers founded, that in these the party corroborating was joined with the principal debtor, whereas here, the bond of corroboration was executed by Mr. Campbell singly.

The Lord Ordinary Gillies, before whom the cause came, upon the resignation of Lord Armadale, gave effect to this distinction, and, upon the ground, that neither the principal debtor, nor the old cautioner, nor the representatives of the deceased cautioner, joined in the security, altered the judgment of Lord Armadale, by which Mr. Campbell had been found liable.

But the pursuers insisted, that this distinction was not recognized in law. It is only where, from circumstances, it is evident that the interposition of the new cautioner was on account, and at the desire of the co-cautioner, that the new cautioner is entitled to total relief. But no inference of this nature is afforded by the mere fact of the cautioner having become bound at different times, or in separate bonds. Accordingly, in the case of Lockhart v. Semple, the corroborating cautioner, who had been singly bound, was nevertheless found liable *pro rata*.

The lord ordinary altered and repelled the defences.

[\*48] The defender petitioned, and argued,—In order to obtain \*total relief, it is not absolutely necessary that the corroborating cautioner should prove that he became a co-obligant directly at the request of the co-cautioner. It is sufficient if the court can discover the meaning of the corroborator in entering into the obligation. His intention forms the sole measure of his responsibility. In the cases rested on by the pursuers, the corroborating cautioner was denied total relief, because the court was satisfied that, *de facto*, he had acceded on the faith of the principal debtor, and that he was not barely a guarantee for the solvency of the co-cautioners, but took his stand along with them. But here, the defender was neither regarded by himself nor any of the parties, in any other light than as a security for the original cautioner; and, accordingly, the defender did not take from Mr. Lee any bond of relief. This saves the present case from the operation of the decision, Lockhart v. Semple. There the corroborator took a bond of relief from the principal debtor, and it became impossible to listen to his claim of total indemnification from all the co-obligants, when, by taking a specific back-bond from one of them, he had marked the individual to whom he trusted for recourse, and on whose faith he had interposed.

Besides referring to the cases quoted on the other side, the defender rested upon Wallace v. Fleming, 27th February, 1685, Fountainhall; Broomhall v. Gowan, July, 1687, Harcarse; Clarkson v. Edgar, 1st December, 1703, Fountainhall; Brooke v. Lord Bargeny, 14th February, 1705, Dalrymple; Mackenzie v. Mackenzie, 17th January, 1753, Elchie's Notes, p. 92.

The court adhered, (13th December, 1814,) and repeated the judgment on advising a reclaiming petition and answers, 18th May, 1815.

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\*A SURETY IS ENTITLED TO BE MADE ACQUAINTED WITH THE WHOLE CONTRACT ENTERED INTO WITH HIS PRINCIPAL, AND [ \*49 ] THE WITHHOLDING FROM THE SURETY, WITH THE KNOWLEDGE OF THE CREDITOR, OF ANY CIRCUMSTANCE WHICH IS CALCULATED TO AFFECT HIS RESPONSIBILITY, AMOUNTS TO A FRAUD ON THE SURETY, AND DISCHARGES HIS LIABILITY.

### I.—PIDCOCK v. BISHOP.

Jan. 25, 1825.—E. 3 B. & C. 605. Eng. Com. Law Reps., vol. 10.

ASSUMPSIT by the plaintiffs, manufacturers of pig-iron at Lightmoor, in the county of Salop, against the defendant a dealer in iron at Bank-side, London, upon his guarantee. The guarantee declared upon was contained in a letter of the 16th December, 1822, addressed by the defendant to the plaintiffs, and was as follows:—

“At the request of Mr. Thomas Tickell, I beg to inform you that I will guaranty you in the payment of £200 value to be delivered to him in Lightmoor pig-iron.”

At the trial before Hullock, B., at the Warwick Lent Assizes, 1824, it was proved on the part of the plaintiffs, that the defendant gave the above mentioned guarantee, and that in February, 1823, the plaintiffs supplied to Tickell twenty tons of Lightmoor pig-iron of the value and price of £82, 10s., that they had applied to him for payment, but he was unable to pay any part of the money. On the part of the defendant, Tickell proved that he had formerly been in the iron trade, but had become bankrupt some time before the transaction out of which the action arose; that in the beginning of December, 1822, he applied to John Pidcock, one of the plaintiffs, (who managed the business at the Lightmoor works,) to supply him with Lightmoor pig-iron on credit in the usual way, and told him, that if the company would supply him, he would pay him (John Pidcock) ten shillings (beyond the price to be paid to the company) on every ton of iron supplied to him, and which ten shillings was to go towards the liquidation of an old debt due from Tickell to John Pidcock. John Pidcock said he must consult his partners, but that he thought they would not consent to supply the iron without a guarantee. It was afterwards \*agreed between Tickell and John Pidcock that the iron should be supplied, Tickell paying the [ \*50 ] company the market price, and ten shillings per ton extra to John Pidcock in liquidation of his private debt, and also procuring a satisfactory guarantee for the price of the iron. Tickell accordingly applied to the defendant, who gave the guarantee, but the agreement he had entered into with John Pidcock for the payment of the extra ten shillings per

ton was not communicated to the defendant. A bill of parcels was sent with the iron, as follows:—

|                                    |          |                 |
|------------------------------------|----------|-----------------|
| “To 20 tons of Lightmoor pig-iron, | £82 10 0 | to Mr. Pidcock. |
| Debt, . . . . .                    | 10 0 0   |                 |
|                                    | —————    | total £92 10 0  |

On the part of the defendant it was contended, that the agreement as to the payment of the ten shillings per ton was a fraud upon the defendant, and that he consequently was not liable upon his guarantee. Hullock, B. thought this no answer to the action, and a verdict was found for the plaintiffs for £82, 10s., but liberty was given to the defendant to move to enter a nonsuit.

In the following Easter Term, Denman obtained a rule to show cause why the verdict should not be set aside and a nonsuit entered, and in this term

*Clarke* and *N. R. Clarke* showed cause.—There was no fraud upon the defendant either practised or intended. There was nothing in the agreement by which he could be prejudiced, or by which the probability of his being called upon to pay for the iron in consequence of his guarantee was increased. The agreement, as far as it respected the ten shillings, was merely an arrangement between J. Pidcock and Tickell for the payment of the debt of the latter by easy instalments. There was nothing to show that it was not at the time an existing debt, and one upon which Pidcock might have sued; for though Tickell stated he had been a bankrupt, it did not appear when this debt was incurred, and if it was before the bankruptcy, it did not appear that Tickell had obtained his certificate, or that the debt had been proved under his commission. If the defendant \*intended to rely upon the debt [\*51] having been barred by the bankruptcy, it was for him to prove it. Taking it then to be a debt still due from Tickell to J. Pidcock, the agreement, so far from being prejudicial to the defendant, was, in fact, for his advantage; for if J. Pidcock, after the supply of the iron, had sued Tickell and obtained judgment against him, and taken his effects in execution for the whole amount of his debt, Tickell would probably have been less able to pay for the iron than if he was allowed to pay his debt by such easy instalments as were stipulated for in the agreement. It was not the agreement, but the previous debts and embarrassed circumstances of Tickell which rendered him unable to pay for the iron; the defendant was probably aware of Tickell's situation when he gave the guarantee, or if not, and he gave the guarantee without inquiring into it, he must take the consequences of having neglected to do so. The case of *Jackson v. Duchaire*, 3 T. R. 551, was very different from this case; there a person of the name of Welch, wishing to assist the defendant, who was entering upon a house which the plaintiff had before occupied, agreed to purchase of the plaintiff for the defendant, at the price of £70, the goods left by the former in the house; and it formed part of the consideration which induced Welch to furnish the money that the plaintiff agreed to take £70 for the goods; and the court therefore held, that a private agreement between the plaintiff and defendant, that £30 more should be paid by the latter, was a fraud upon Welch, who had

paid £70 in confidence that that sum was the whole consideration. The plaintiff, therefore, could not recover the £30. But there is nothing in the case to show that the court considered the contract between plaintiff and Welch, for the sale of the goods at £70, void, or that Welch could recover back that sum. If, in the present case, the ten shillings per ton to be paid to J. Pidcock had not been to discharge an existing debt, the case of *Jackson v. Duchaire* might have been an authority to show that J. Pidcock could not recover that money, but even then it would be no authority for saying that the guarantee was not binding to the extent of the actual price of the iron, and it was never proposed or intended to make the defendant liable beyond that.

*\*Denman and F. Pollock, contra.*—Although it is attempted to distinguish the present case from that of *Jackson v. Duchaire*, [\*52] they are the same in principle. Wherever a person agrees to pay money for, or guarantees the payment of money by another, it is a fraud upon that person if the contract, in consequence of which he agrees to pay the money, or for the fulfilment of which he consents to become guarantee, is not fully and fairly disclosed to him. Here the contract, the fulfilment of which was guaranteed by the defendant, (which was merely a contract for iron at the market price,) was totally different from the contract actually entered into with Tickell. If the agreement for the payment of the extra ten shillings per ton had been communicated to the defendant, he might, perhaps, have refused to become guarantee.

ABBOTT, C. J.—I am of opinion that a party giving a guarantee ought to be informed of any private bargain made between the vendor and vendee of goods which may have the effect of varying the degree of his responsibility. Here the bargain was that the vendee should pay, beyond the market price of the goods supplied to him, ten shillings per ton, which was to be applied in payment of an old debt due to one of the plaintiffs. The effect of that would be to compel the vendor to appropriate to the payment of the old debt a portion of those funds which the surety might reasonably suppose would go towards defraying the debt, for the payment of which he made himself collaterally responsible. Such a bargain, therefore, increased his responsibility. That being so, I am of opinion that the withholding the knowledge of that bargain from the defendant was a fraud upon him, and vitiated the contract.

BAYLEY, J.—It is the duty of a party taking a guarantee to put the surety in possession of all the facts likely to affect the degree of his responsibility; and if he neglect to do so, it is at his peril. It is highly probable that J. Pidcock proved his debt under the commission against Tickell, although that does not appear on the evidence; but, however that may be, the question in this case depends upon the nature of the bargain between Tickell and J. Pidcock. The defendant might [\*53] \*reasonably suppose that the iron was to be supplied to Tickell at the market price, but by the bargain Tickell was to pay, beyond the market price of the iron, ten shillings per ton to J. Pidcock, in discharge of an old debt due to him. Now if the plaintiff had apprized the defendant that there was such a subsisting bargain, he would have known that Tickell would not be able to pay for so much of the iron as he otherwise

might have done, and might have declined entering into the guarantee. He gave the guarantee under a supposition that Tickell would be at liberty to apply all his funds, except what were necessary for his support, towards payment of the iron supplied at the regular market price, whereas the plaintiff, when he accepted the guarantee, knew that Tickell was to pay him not only the market price of the iron, but ten shillings per ton on the iron provided, in extinction of an old debt. The concealment of that fact from the knowledge of the defendant was a fraud upon him, and avoids this contract. Where by a composition deed the creditors agree to take a certain sum in full discharge of their respective debts, a secret agreement, by which the debtor stipulates with one of the creditors to pay him a larger sum, is void, upon the ground that that agreement is a fraud upon the rest of the creditors. So that a contract which is a fraud upon a third person may, on that account, be void as between the parties to it. Here the contract to guaranty is void, because a fact materially affecting the nature of the obligation created by the contract was not communicated to the surety.

HOLROYD, J.—I am also of opinion that the contract of the surety is not binding upon him, by reason of the plaintiff's not having communicated to the surety a secret bargain previously made by him with the vendee of the goods. The effect of that bargain was to divert a portion of the funds of the vendee from being applied to discharge the debt which he was about to contract with the plaintiffs, and to render the vendee less able to pay for the iron supplied to him. The defendant might reasonably suppose that Tickell was to pay only the market price of the iron, but the plaintiff knew that he was to pay more, and did not communicate that fact to the plaintiff. The plaintiff and defendant therefore were not on equal terms. [\*54] \*The former with the knowledge of a fact which necessarily must have the effect of increasing the responsibility of the surety, without communicating the fact to him, suffers him to give the guarantee. That was a fraud upon the defendant, and vitiates the contract.

LITTLEDALE, J.—I think that a surety ought to be acquainted with the whole contract entered into with his principal. The surety might fairly suppose that the vendee would be able to pay the market price of the iron out of its produce, when manufactured, and he gave the guarantee under that supposition; but if he had known that, besides paying the market price of the iron, the vendee was also to pay ten shillings per ton in extinction of an old debt, he would have known that the vendee would have so much less to appropriate in payment for the iron, and, consequently, that the risk of the surety would thereby be increased. Besides the object of a person becoming a surety for another is to render him a service. But the effect of such a private bargain as was made in this case would be to defeat the object of the surety. For if the proceeds of the goods supplied to the vendee are to be applied wholly in discharge of an old debt, a benefit will be conferred on the vendor of the goods, and not on the vendee; now that certainly was not the intention of the surety.

Rule absolute.

## II.—STONE v. COMPTON.

Nov. 26, 1838.—E. 5 Bing. N. C. 142. Eng. Com. Law Reps., vol. 35.

THE declaration contained two counts; the first on a promissory note, dated the 25th of November, 1831, whereby the defendant promised to pay the plaintiffs and John Martin, since deceased, or order, on the 22d of November, 1832, £2600 with interest, and to pay the interest half-yearly. The second count was upon an account stated.

*\*The Defendant Pleaded;*—As to the first count—that he was induced to make the promissory note, and the same was [\*55] obtained from him by the fraud, covin, and misrepresentation of the plaintiffs, and J. Martin, and others in collusion with him.

The plaintiffs by their replication traversed the fraud in the first plea; replied *de injuria* to the second; traversed the payment in the third; the sale of the mortgaged property in the fourth,—averring that the plaintiffs did not sell or dispose of, or cause to be sold or disposed of, the hereditaments, instruments, or policies and premises in the indenture, and joined issue on the last.

A verdict was taken for the plaintiffs for £3000, subject to the opinion of the court on a special case, which stated that

The plaintiffs were bankers in London, and the defendant a general merchant residing in the same place.

For a considerable period, previously to the year 1825, Messrs. Coxe and Chambers, who carried on business in partnership, had a banking account with the predecessors of the plaintiffs in their banking firm, which banking account was continued with the plaintiffs, until the bankruptcy of Coxe and Chambers, as hereinafter mentioned.

Mr. Coxe, one of the partners in the house of Coxe and Chambers, also kept with the plaintiffs a private and separate banking account for himself individually, which account was closed on the 24th of February, 1830.

In 1825, John Martin, since deceased, and the plaintiffs George Stone and Henry Stone, who then composed the banking firm, lent to Mr. Coxe, on his private account, the sum of £800, as a specific loan on the security of an assignment of a policy on his own life, effected in the Equitable Assurance Company, for £1500 in 1809.

In the beginning of the year 1830, and before the 24th of February, the plaintiffs' firm allowed Mr. Coxe to receive from the Equitable Assurance Office the sum of £714, being the consideration for the sale of certain additions or accumulations \*upon the before-mentioned [\*56] policy of insurance, which would have become payable at the death of Mr. Coxe, upon the understanding that he was thereout to pay to them the sum of £300, in part discharge of the debt of £800, which he accordingly did, and which reduced his debt to £500.

Between April, 1825 and November, 1831, the plaintiff, J. Martin, then J. Martin the younger, G. Stone the younger, and James Martin, had been partners in the bank; and on the 24th of June, 1830, the plaintiffs'

firm lent to Mr. Coxe a further sum of £100, making, with the former balance of £500, £600 due on his own private account; the interest upon that loan was paid on or about Christmas in every year, up to Christmas, 1830.

In 1831, Messrs. Coxe and Chambers, having occasion for a loan on their partnership account, entered into a negotiation with the plaintiffs' firm in order to obtain it. Pending that negotiation, and before any definite agreement between the plaintiffs' firm and Coxe and Chambers was come to, viz., on the 11th November, 1831, the plaintiffs' firm advanced to Coxe and Chambers £300 as a specific loan, which loan was on that day carried to the credit of Coxe and Chambers in their general banking account.

On the 16th of the same month, it was agreed between the plaintiffs and Coxe and Chambers, through the medium of Coxe, but without the knowledge or privity of the defendant, who had not been applied to to become surety, that the plaintiffs' firm should make a loan to Coxe and Chambers of the sum of £2600, and that the plaintiffs' firm should thereout deduct or be repaid the sum of £600 due from Mr. Coxe on his private account, and secured as before mentioned, and the interest thereon, amounting together to £627, 10s. 8d., and also the £300 and interest, advanced to Coxe and Chambers on the 11th of the same November; and that thereupon the policy of insurance for £1500, which had been given as a security for £800, should be transferred or stand as a security for the said sum of £2600, which was to be further secured by an assignment to the plaintiffs' firm of certain leasehold premises, the property of Mr. Edward Chambers, the father of George Chambers, and of a certain [ \*57 ] policy effected in the Equitable Assurance Company for £500, on the life of the said G. Chambers; and also by a joint and several promissory-note of some other persons who were to be afterwards named by Coxe and Chambers, and to be approved of by the plaintiffs; and subsequently, but before the 25th of the same November, the defendant and Edward Chambers were accordingly proposed as sureties, and were approved of by the plaintiffs.

An indenture, by way of mortgage, bearing date the 25th November, 1831, was made between Edward Chambers as therein described, of the first part; G. Chambers, of the second part; L. S. Coxe, of the third part; and the plaintiff's firm, of the fourth part, and was executed by E. Chambers, G. Chambers, and L. S. Coxe, in conformity with the above agreement, the deed reciting, among other things, that the entire interest in the £1500 policy was available for the purposes of that security, the £800 formerly borrowed on it by Coxe having been repaid to the plaintiffs, but not disclosing the arrangement made as to the application of the £2600, or the deduction that was to be made from it in respect of previous debts. The deed was executed by the parties who signed it on the day it bore date, at the office of the solicitors for the plaintiff's firm, and was read over in the presence of the defendant and Messrs. Coxe and Chambers.

At the same time the note upon which this action was brought was



made and signed by the defendant and by E. Chambers, of which the following is a copy:—

“£2600.

“*London, 25th Novr., 1831.*

“On the 22d day of November, 1832, we jointly and severally promise to pay Messrs. Martin and Stone, or order, two thousand six hundred pounds, with interest, and to pay the interest half yearly, for value received.”

On the back of the note the following memorandum was written, at the time it was made, and before it was executed, and read over to the defendant:—“The within sum of £2600 is the same sum of money as is mentioned in an indenture dated the 25th November, 1831, and made between E. Chambers, of the first part; George Chambers, of the second part; L. S. Coxe, of the third part; and Messrs. Martin and Stone, of the fourth part.”

\*The defendant was surety in the note for Messrs. Coxe and Chambers, and became so at their request, made through G. [ \*58 ] Chambers, who communicated to him that the plaintiffs were to lend to the firm of Coxe and Chambers £2600; but did not then, or at any other time, until long after the securities were executed, communicate the arrangement and agreement between the plaintiffs and Coxe and Chambers, or that there was any arrangement or agreement amongst the parties, further than that the plaintiffs were simply to lend the sum of £2600 to Coxe and Chambers.

Before the defendant signed the promissory note, the recitals of the deed were read over to him; but the plaintiffs did not, nor did their solicitor, nor did Coxe or Chambers, inform the defendant before he signed such note, that any agreement existed respecting the application of the sum of £2600, or of the deduction to be made thereout; or that Coxe and Chambers, or either of them, were indebted to the plaintiffs; or that there had been any bonus received on the policy of insurance. Nor did the defendant then, or at any other time, make any inquiries of the plaintiffs, or of their solicitor, or of Coxe and Chambers, as to the state of the accounts between the plaintiffs and Coxe and Chambers, or either of them, or as to the intended application of the loan, or as to any bonus having been received upon the policy of insurance.

Coxe and Chambers had on the said 25th of November a small sum to their credit in their banking account with the plaintiffs, and they did not overdraw that sum until the 29th of November, when they drew various checks, amounting together to a sum considerably more than the balance of their banking account; and on the same 29th of November, the plaintiffs' firm credited Coxe and Chambers in their general banking account, and in their pass-book, as follows:—Cr. 29th November, cash lent, £2600.—Dr. 1831, November 29th. By sundry loans and interest, £928, 12s.; five days' interest allowed on £2600, £1, 8s. 6d.”

The sum of £928, 12s. was the amount of the different loans above mentioned, and the interest due thereon; and the accounts were afterwards continued between the parties in the same pass-book and general account.

[\*59] \*In January, 1832, John Martin died. Coxe and Chambers paid the plaintiffs' firm the interest on the £2600 annually from the time of the advance till Christmas, 1834, the amount of such interest having been from time to time charged and allowed in the accounts between Coxe and Chambers and the plaintiffs, and stated in the usual pass-book.

In July, 1835, Coxe and Chambers stopped payment, and soon afterwards became bankrupts.

On or about the 28th of July in that year, the plaintiffs notified such stoppage to the defendant, and reminded him of his liability on his note.

After the bankruptcy of Coxe and Chambers, their assignees sold, by public auction, the two before-mentioned policies, which produced the sum of £871, viz., the policy for £500 produced the sum of £36, and the policy for £1500 produced £835, which the plaintiffs received; the plaintiffs subsequently sold the leasehold premises which had been mortgaged to them, by private contract, for the sum of £270; and they also received a dividend under the bankruptcy of Coxe and Chambers on the debt of £2600, of £364, 7s. They gave the defendant notice of such intended sales, and also of the sums which were realized.

The sums still due to the plaintiffs on the note amounted to £1300, 10s. 7d., with interest, to recover which this action was brought.

The court were to be at liberty to draw any inference which a jury might have drawn.

The question for the opinion of the court was,—

Whether the plaintiffs were entitled to recover any and what sum; and the verdict was to be entered on the separate issues for plaintiffs or defendant accordingly, or a nonsuit might be entered, as the court should direct.

The case was argued by *Wilde*, Serjt., for the plaintiffs, and *Sir W. Follett* for the defendant.

It will be convenient to begin with the argument for the defendant.

[\*60] *Argued for Defendant*;—If the situation of the surety be, \*by the act of the creditor, materially varied from what he was led to expect upon entering into the security, he is absolved from his engagement, whether the altered circumstances occasion a detriment to him or not; for his engagement is entered into upon the representations made to him, and if in those representations there be falsehood or concealment, a fraud in law has been committed, which avoids the security.

In *Pidcock v. Bishop*, it was agreed between the vendors and vendee of goods, that the latter should pay 10s. per ton beyond the market price, which sum was to be applied in liquidation of an old debt due to one of the vendors. The payment of the goods was guaranteed by a third person, but the bargain between the parties was not communicated to the surety; and it was held that that was a fraud on the surety, and rendered the guaranty void. *BAILEY, J.* said, "It is the duty of a party taking a guaranty, to put the surety in possession of all the facts likely to affect the degree of his responsibility; and if he neglect to do so it is at his peril." "Where by a composition deed the creditors

agree to take a certain sum in full discharge of their respective debts, a secret agreement, by which the debtor stipulates with one of the creditors to pay him a larger sum, is void, upon the ground that that agreement is a fraud upon the rest of the creditors. So that a contract which is a fraud upon a third person may, on that account, be void as between the parties to it. Here the contract to guarantee is void, because a fact materially affecting the nature of the obligation created by the contract was not communicated to the surety." HOLROYD, J.—"The contract of the surety is not binding upon him, by reason of the plaintiffs not having communicated to the surety a secret bargain previously made by him with the vendee of the goods. The effect of that bargain was to divert a portion of the funds of the vendee from being applied to discharge the debt which he was about to contract with the plaintiffs, and to render the vendee less able to pay for the iron supplied to him." "The plaintiff and defendant therefore were not on equal terms. The former, with the knowledge of a fact which necessarily must have the effect of increasing the responsibility of the surety, without communicating the fact to him, suffers him to give the guaranty. That \*was a fraud upon the defendant and vitiates the contract." [\*61] LITLEDALE, J.—"I think that a surety ought to be acquainted with the whole contract entered into with his principal."—*Jackson v. Duchair*, 3 T. R. 551; *Mayhew v. Crickett*, 2 Swanst. 193; and *Glyn v. Hertel*, 8 Taunt. 208, proceeded on the same principle. See *Harrison's Index*, 885. Here, the defendant was led to suppose that the whole of the £2600 would be applied to the use of the firm of Coxe and Chambers; he was not apprized of the deduction of £900 for a previous debt; to that extent, and at all events to the extent of the £600 (part of the £900) which was deducted for the private debt of Coxe, the firm was less able to meet the demands of their creditors than the surety had reason to expect. He was also deceived as to the value of the £1500 policy assigned to the plaintiffs as a collateral security. The deed of November, 1835, reciting that the £800 lent to Coxe on the security of that policy had been repaid, the surety was led to suppose that the entire policy, with all its accumulations, would be available to the plaintiffs in reduction of any demand against the surety; whereas the plaintiffs held the policy minus the bonus of £714 which had been paid to Coxe. The defendant, therefore, having been kept in ignorance as to the real amount of the loan to Coxe and Chambers, and having been misled as to the value of the security in the plaintiffs' hands, there was fraud in law sufficient to establish the first plea, and avoid the promissory note.

*Argued for the Plaintiffs*;—The question upon this record was, not as to the incidents of a guaranty, but whether the defendant had been induced to give a promissory note by fraud, and whether there was a failure of consideration. It was not necessary for the plaintiffs to contest the principle contended for on the part of the defendant in respect of guaranties; for it is true, that where a party enters into a special guaranty, the limitations attached to such an instrument must be attended to; but, where he becomes surety by a promissory note, he is generally liable if there be no fraud or failure of consideration; the form of the instrument

is a substantial part of the contract; there must be *bona fides*, but no communication \*of the circumstances attending the transaction [ \*62 ] is necessary, as in the case of a guaranty or policy of insurance, where the underwriter has no means of obtaining a knowledge of the risk, except what he is told by the assured; thus, in *Norris v. Nichols*, 3 B. and Adol. 41, the defendant gave a promissory note, payable to R. Johnston, for which the defendant had received no consideration, as a security for goods to be sold to Johnston on credit; and Johnston indorsed the note over to the creditors. Johnston afterwards executed a deed of composition with the creditors, by which he undertook to pay his debt to them by instalments, and it was stipulated that they should not be prevented by that arrangement from suing on any securities which they held, and that on any default of paying the instalments, the deed should be void: it was held, that the delay granted to Johnston by that agreement did not discharge the defendant. And Lord Tenterden said, "Deeds of this kind are very common, and it is very usual to insert clauses like the present, reserving the remedy against sureties. If we were to hold that, notwithstanding such a proviso, the liability of a person in the situation of this defendant was gone, it might prevent such deed from being entered into, which would often be against the interests of all parties. In other respects, I think there is no material difference between this case and *Fentum v. Pocock*. The same principle was acted on in *Price v. Edmunds*, 10 B. and C. 578; *Bank of Ireland v. Beresford*, 6 Dow. P. C. 237; and *Free v. Hawkins*, 8 Taunt. 92. *Glyn v. Hertel* only decided that the exchange of one promissory note for another is not a new advance of money. Then, here, there was no fraud either in fact or in law: for it was not necessary to communicate to the defendant the manner in which the £2600 was distributed among the borrowers, and it did not lessen their solvency that a portion of the sum was applied to the discharge of the debt due to the lender; eventually that debt must have been discharged, and it was immaterial whether out of the £2600, or from any other source. As to the policy of insurance, the defendant being no party to the deed, could not take advantage of any misrecital; the deed was only read in his presence to show the form in which the loan was to be effected; but it would occasion interminable [ \*63 ] embarrassment in the commercial world, if \*upon every advance of money upon the security of a promissory note, the maker should be allowed to enter into collateral transactions, and traverse the allegations in a deed in which he had no concern. The effect of the defendant's objection would be to write into a note which creates a general liability, limitations and restrictions which were never intended by the parties.

*Cur. adv. vult.*

TINDAL, C. J.—The main question in this case, and which arises upon the first plea to the count upon the promissory note, is this, whether the promissory note was obtained from the defendant under circumstances which are deemed in law to amount to covin, (for there is no suggestion whatever of any intentional fraud or misrepresentation on the part of

the plaintiffs personally,) so as thereby to avoid the validity of the security in the hands of the plaintiffs.

The promissory note having been given by the defendant as a security for the debt of Messrs. Coxe and Chambers, and the note still remaining in the hands of the plaintiffs, the original payees, the consideration upon which it was given to them, and the several circumstances under which the defendant was induced to enter into it, are the subject of inquiry and investigation in the present action. And with respect to the nature of such inquiry, and its bearing and effect on the validity of the instrument, we cannot see any sound legal distinction arising from the form of the security itself, that is, whether such security is taken in the form of a promissory note, or as an ordinary guaranty for the payment of the debt of a third person. For the liability of the maker of the note, and of the guarantor, depends precisely on the same event, namely, the default of the principal debtor to make good his payment; and the extent of the surety's liability is precisely the same on either instrument; so that there seems no reason, and no authority has been cited to the effect, that the validity of the two instruments should not stand upon precisely the same footing, so far as depends on the circumstances under which the same were given.

Now the principle to be drawn from the cases to which \*reference has been made in the course of argument we take to be [\*64] this: that if, with the knowledge or assent of the creditor, any material part of the transaction between the creditor and his debtor is misrepresented to the surety, the misrepresentation being such, that but for the same having taken place, either the suretyship would not have been entered into at all, or, being entered into, the extent of the surety's liability might be thereby increased, the surety so given is void at law, on the ground of fraud.

The question therefore becomes this, Whether, upon the facts stated in the special case, there appears to have been any such misrepresentation on the part of the plaintiffs?

It is perfectly true, as urged by the counsel for the plaintiffs, that the agreement between the plaintiffs and Coxe and Chambers, under which the former were to be allowed to deduct out of the advance of the £2600 the old debt of £800, due from Coxe on his separate account, was entered into before any application had been made to the defendant to become surety; and also that Coxe and Chambers never communicated to the defendant, until long after the transaction, that any such arrangement had been made, or indeed any other, than that the plaintiffs were simply to lend them £2600; and if the matter had rested here, no objection, either on the ground of suppression or misrepresentation, could have been urged against the validity of the note. The plaintiffs were not to be made responsible for the communication, or want of communication, between their debtor and the surety, unless they are shown to be agreeing to it; and for anything which appears, as to this part of the transaction, they were ignorant that a correct statement had not been made to the defendant. But it appears from the special case, that, at the time of signing the note, the principal debtors, Coxe and Chambers, and the

JULY, 1858.—4

defendant, were at the office of the plaintiffs' attorney, where the deed of the 25th of November was read over in their presence; the case stating expressly, "that before the defendant signed the promissory note, the recitals of the deed were read over to him;" and that upon the same occasion, and before the note was signed by the defendant, the memorandum was indorsed upon the note, stating that the sum mentioned in [ \*65 ] it was the same \*sum as that mentioned in the deed. Now we think the construction, and the only construction, which can be put upon the recitals in the deed is, that the former debt of £800 due to the plaintiffs from Coxe, on his separate account, and the repayment of which was secured by Coxe's policy for £1500, had been, at that time, paid by Coxe to the plaintiffs; and that the sum agreed to be advanced by the plaintiffs to Coxe and Chambers upon a new loan, was the full and entire sum of £2600. We cannot consider these recitals in any other light than as a direct representation made to the defendant before the note was signed, not indeed personally by themselves, but by the agents of the plaintiffs, employed in carrying the negotiation for the loan into effect, and, consequently, by whose acts the plaintiffs are bound; and that this representation was untrue in a material respect, namely, that the private debt of Coxe had not been paid at the time of the execution of the deed; and that the entire sum of £2600 was, by the private stipulation between the parties, not to be advanced to, or placed to the credit of Coxe and Chambers, but only the sum of £2600, minus the amount of the debt due from Coxe to the plaintiffs.

And we think ourselves bound, upon every legal principle of reasoning, to assume, that as the defendant was present when the recitals of the deed were read over to him, he must have signed the note with a full knowledge and understanding of the facts therein stated, and in the faith and confidence that the statement was true. The recitals were read over to him for the purpose of making him acquainted with the state of the account between Coxe and Chambers and the plaintiffs, and with the collateral securities given by Coxe and Chambers, which he, the surety, might, if it became necessary, call to his aid and indemnity; and his attention must have been called to the recitals in the deed by the circumstance of the memorandum indorsed on the note, which could be placed there for no other purpose than to connect the note with the transaction stated in the deed.

Then, as it appears to us that the representation as to the repayment of the debt due from Coxe, and the amount of the new loan to Coxe and Chambers, was untrue, and that such \*misrepresentation related [ \*66 ] to a fact material to the surety's interest, we think the promissory note is thereby void. And such being our opinion on this point, it becomes unnecessary to discuss the second objection which has been urged, as to the misrepresentation in the recitals of the deed, of the then existing state and value of Coxe's policy; on which point, however, if it had been necessary, we should have been ready to declare our opinion.

We think, therefore, a nonsuit should be entered.

Judgment of nonsuit.

## III.—SMITH v. BANK OF SCOTLAND.

June 16, 1813, and Jan. 14, 1829.—S. 1 Dow. 272, and 7 S. 244.

THE late Alexander Paterson was, in the year 1794, appointed agent for the Bank of Scotland at Thurso; and, upon this appointment, he granted a bond, with certain co-obligants, to the extent of £5000. His salary was only £120, afterwards raised to £140; and it was stipulated by the bank that he should not engage in trade or speculation, nor discount his own bills. These stipulations, however, he disregarded; and, with the knowledge of the bank, he engaged in trade as a grain merchant, and entered into speculations as a house-builder, ship-owner, and distiller; and he also discounted, to a considerable amount, bills on which his own name appeared as a party. It was the practice of the bank to send round an official person annually, but at irregular intervals, to inspect their several agencies; and in September, 1803, the Thurso branch was visited by Mr. Marshall, then inspector for the bank. It appeared from the evidence adduced, that Paterson had succeeded in deceiving Mr. Marshall as to the real state of affairs; and the report returned by the latter to the directors bore, "The books are posted up, and kept with great accuracy; the bills were all regularly drawn, accepted, and indorsed, and agreed exactly with the books; the cash-accounts were not overdrawn; the stamp checks were right; no money is \*borrowed here for [ \*67 ] the bank; indeed few people in the country have any to lend; the past due bills amounted to £1862, 13s. 8d., none of which, I have reason to believe, are bad." Mr. Marshall, however, added, "The agent still continues to be extensively engaged in business and farming, and seems at present to be pinched for money. His own bills in the office amount to £3000, besides £1500 of his acceptances remitted to him through the bank from Montrose. These bills were drawn upon him by his clerk for meal which he sent him to purchase for him at Montrose; and being discounted there, the bank has Mr. Brand's security for them, unless, which it is hoped will not be the case, this should be lost through undue negotiation." Mr. Marshall's report further bore, that "as the transactions at the branch are becoming more numerous," he thought it would be of advantage to order states to be transmitted weekly, instead of once a fortnight; and he also stated that considerable improvement was going on in and about Thurso, and that when a harbour, for building which a public grant had been obtained, should be finished, "the business of the bank in this quarter may be much increased." It did not appear, however, that there actually had been at this time any increase of the business; and shortly thereafter the bank, in consequence of the war breaking out, instructed Paterson, as well as their other agents, to limit his discounts to the sum of £1500 per week; but this instruction was disregarded by him.

At the date of this report Paterson was, in point of fact, in insolvent circumstances, and had applied to his own use a considerable amount of the funds of the bank, although he was able at the time to conceal this from the knowledge of Mr. Marshall, who, when examined in this cause,

deponed, "that nothing stated in the report, or what he saw at the time of the inspection, created any suspicion in his mind of the insufficiency of Paterson; and he was inclined to this, from seeing the names of respectable people on bills with which he had been accommodated."

At this period the amount of Bank of Scotland notes, mentioned in [ \*68 ] the states sent to the bank by Paterson once a \*fortnight as being in his possession, was £3681, and the amount in mixed notes and specie £635. In the subsequent states periodically transmitted, the amount of Bank of Scotland notes in his hands was returned as gradually increasing, till in the return of the 12th of December it was stated at £13,109, while the amount in mixed notes and specie was returned at £1482.

On the 19th of December the following minute in relation to the Thurso branch was made in the bank's order-book;—"New security to be given by the agent to the extent of £10,000, several of his cautioners being dead. The agent to get new cautioners, and the sum to be extended to £10,000. This to be done by a new joint bond for the whole sum, or additional bond for £5000."

On the 20th, a letter was written accordingly by the secretary of the bank to Paterson, in these terms:—"The directors having had under review the cautionary bonds given by their agents; finding some of your cautioners are dead, and at the same time considering that the present amount of your caution is too small for the business done at Thurso, they desire that the amount of your caution may be £10,000 by a new bond for that sum, or by a bond for new securities corroborating the present one for £5000."

In consequence of this, some correspondence took place between Paterson and the bank, who agreed to allow the existing bond to remain without corroboration, and to accept merely an additional bond for £5000. Paterson having accordingly prevailed upon the pursuers, Smith, &c., who were gentlemen resident in the part of the country where the branch was situated, to become bound with him to that amount, a bond was prepared by the bank's agent in Edinburgh, binding the obligants for past as well as future transactions on the part of Paterson, and it was transmitted to Paterson on the 7th of April, 1804, to be executed. It was signed by the cautioners on the 22d and 24th of June following, and was then returned to Edinburgh, where it was received on the 2d of July. Having, however, been signed on the last page only, it was next day retransmitted to Paterson, with instructions to have it "immediately" \*subscribed by himself and the cautioners "on every page, [ \*69 ] in presence of their respective witnesses." The secretary at the time wrote to Paterson's clerk in these terms:—"In case Mr. Paterson has set out from Thurso, I have to request that you will not lose a moment in getting his additional bond, herewith enclosed, fully executed, by getting the gentlemen who subscribed the last page of it to subscribe the first three. I must press this the more, that the bond has been too long delayed, and the blame of delay often laid to my charge." The additional subscriptions having been made, the bond was returned to Paterson, and by him to the secretary, enclosed in a letter dated the



11th of July; but it did not appear to have been actually transmitted to the bank till the 14th.

In obtaining this additional bond, the bank had no communication with the cautioners, either to the effect of requesting them to become cautioners, or of giving them any information regarding the state of Paterson's transactions with the bank, or his conduct as agent.

By this time, the amount of Bank of Scotland notes returned in the states as lying in the office had increased to £17,976, and that of mixed notes and specie to £2164, amounting in all to £20,140, which was the sum apparently in the agent's hands by the state dated 9th July. About this time, Mr. Sim, one of the officers of the bank, set out on the annual tour of inspection of the northern agencies, and he arrived at Thurso on the 13th, it being the custom for the inspector to take the most distant branch first in order. Mr. Sim deposed, that "when he went from Inverness to Thurso, he left at the former place his gig and all his clothes, taking with him only one change of linen;" and "that at this time he had not the slightest suspicion that he was to be detained at Thurso more than one day." On inspection, however, of the affairs of the branch, on the 14th, he ascertained that of the sum of £20,140 returned the week before as being in the agent's hands, there was deficient £16,200. This he communicated to the bank in the following letter addressed to the secretary:—"I arrived here \*last night; but on account of the absence of Mr. Paterson, and of Mr. Ryrrie his accountant, who [\*70] had gone to the country in the evening, I was under the necessity of postponing the commencement of my examination of the bank's affairs here till this morning. The suspicions which have for some time past been entertained with respect to the state of matters at this branch, I am now sorry to inform you prove, by my inspection, to have been but too well founded. The deficiency in cash amounts to no less a sum than £16,200. Of this Mr. Paterson (who has returned this morning) has shown me bills to the amount of £5000, the greatest part of which have been discounted in the office for his own accommodation, and are now past due, but all of which he considers perfectly good. The remaining part of the sum has been employed in the purchase of grain, which he exports, and which is still in the market; and in the course of a week or two he tells me that he expects to receive bills on London to the amount of £4000, to be applied to the deficiency." To this communication, Fraser, the secretary, returned the following answer:—"Your letter of the 14th shall be laid before the directors on Monday. Meantime I shall by every post be looking for farther particulars from you, and you may expect to hear again from me soon."

Paterson was immediately removed from the agency; and Smith, &c., the cautioners in the additional bond, shortly thereafter brought a suspension as of a threatened charge on the bond, and they also raised an action of reduction, concluding to have the bond set aside, on the grounds, 1. That the subscriptions on the three first pages were adhibited without the presence of witnesses, and that the bond was otherwise defective in the solemnities required by law. 2. That it was not a delivered evident, having been in Paterson's hands at the date of his removal; and, 3. That

it had been obtained by the bank by fraud and deceit, under a false pretence, while they were in the knowledge that Paterson was verging towards bankruptcy, and unable to pay what he was then due them, without communicating these circumstances to the cautioners.

[ \*71 ] The cause having been reported to the court on informations, \*their lordships (2d and 18th December, 1806,) repelled the reasons of reduction, and assolizied.

The pursuers thereupon appealed.

The House of Lords (16th June, 1813,) found "that the deed in question, if not impeachable on other grounds, is to be considered as a delivered deed;" but that the appellants "ought to be allowed to make proof of the circumstances by them alleged as grounds for reducing the deed in question, as unduly obtained by concealment or deception, if the deed is valid according to the statutes 1681 and 1696;" and therefore remitted the cause with instructions "to consider the same as to the validity of the deed, as the same may be affected by the said statutes, or either of them, having regard to the nature of the deed;" and if the court should adjudge the deed to be valid, then to allow the pursuers "a proof of the circumstances by them alleged as affording ground for reducing it, as unduly obtained as aforesaid."

Lord ELDON, Chancellor, observed,—The next question related to the materiality and effect of the circumstances offered to be given in evidence in regard to this bond. If an agent had been guilty of embezzlement, or other improper conduct unknown to his employer, the cautioner would be liable. But if a man found that his agent betrayed his trust, that he owed him a sum of money, or that it was likely he was in his debt, if, under such circumstances, he required sureties for his fidelity, holding him out as a trustworthy person, knowing, or having ground to believe, that he was not so, then it was agreeable to the doctrines of equity, at least in England, that no one should be permitted to take advantage of such conduct, even with a view to security against future transactions of the agent. The cautioners here said, that they were taught by the bank to believe that Paterson was a good man, when the bank knew, or had reason to believe, that he was not so, and they offered to prove that the bank did, at the time of requiring this additional security, know of Paterson's misconduct, or had good reason to believe that he had misconducted himself. Now I \*understood the Court of Sessions to say, that [ \*72 ] though they proved all this they proved nothing.

The letter, they alleged, requiring additional security, was written in December, 1803. Marshall, one of the bank inspectors, had been at Thurso in the September preceding, and they said that he had to wait four days before Paterson would state his accounts, though he (Paterson) ought to have been prepared to do so at a moment's warning. Marshall had, as they alleged, made a report at the time to the bank, and they called upon the bank to produce that report. They had not the power in Scotland to compel a discovery, as in our courts of equity; but if it could be shown that Paterson had been guilty of such a gross breach of duty, as to baffle the bank inspector for four days, till he could fabricate an account, and that the bank was apprized of that circumstance, though

the cautioners could not compel the production of the report, they might examine Marshall as a witness, and if he stated that he had made such discoveries to the bank, in regard to Paterson and his affairs, as put the bank *in mala fide* with respect to the cautioners, that would surely be very material evidence in the cause.

The reason alleged by the bank for requiring the additional security was, that the business at Thurso had increased. Now the cautioners affirmed, that it had not increased, and that the ostensible ground on which the bank demanded the additional security was contrary to the fact; and they offered to prove, that the state of the business was such, that £5000, the amount of the former security, was fully sufficient to cover it. And they alleged, that the additional bond was, therefore, really intended as a security, not against future misconduct, but for the payment of a debt known by the bank to have been previously incurred. And though the bond should be considered as having been given to protect the bank, partly against past transactions as well as future; yet if the bank applied it solely to the past, and immediately dismissed the agent, so as to prevent any possibility of its being applicable to the future, then that was a fact to be given in evidence in attempting to show that the real intent of the bank was to procure security for the payment of a debt already known to them to exist, but concealed from the cautioners.

\*Much had been attempted to be made of the circumstance of the bank sending Sim, another of their agents, by stealth, as [\*73] it had been alleged, to Thurso. This was a circumstance to be looked after, though at present it did not appear to be very material. But if Sim had communicated any important information to the bank on the subject, he might be examined as a witness.

Another fact was stated, viz., that when the same persons connected with the bank heard that Paterson had provided the desired security, one of them exclaimed, that he would as soon have expected that Paris should come to Edinburgh, as that Paterson had got security. Why then, this was evidence to show that it was at least known to persons about the bank that Paterson's situation had been such, that no prudent man, if he had known it, would have become security for him; and this was a material circumstance for a court of equity to consider.

One case similar to the present had come before myself, (Maltby's case.) A clerk to the Fishmongers' Company had incurred a considerable debt. The *deficit* had been increasing from year to year, and was at length carried beyond what the company were likely to recover. They demanded additional security, which he procured. The case came before me only upon motion, but I had thought a good deal upon it, and the light in which it appeared to me was this:—if he knew himself to be cheated by an agent, and concealing that fact, applied for security in such a manner, and under such circumstances as held him out to others as one whom he considered as a trustworthy person, and any one, acting under the impression that the agent was so considered by his employer, had become bound for him, it appeared to me that he could not conscientiously hold that security. I was then of opinion, that the Fishmongers' Company could not hold their security. I do not know

what became of the case afterwards, but I believe that my opinion was submitted to, and that no further proceedings were had. I have since reconsidered the matter, and still retain my former opinion, and would act upon it judicially if occasion offered. I therefore think that an [ \*74 ] opportunity ought to be afforded to these cautioners to prove \*the facts which they allege, and offer to substantiate by evidence.

Lord REDESDALE.—The material questions, as I with difficulty collect them from the confusion of the pleadings in the case, appear to be these ; —1st, The validity of the instrument in respect of execution and delivery ; 2d, The construction of the instrument ; 3d, The effect of the particular circumstances under which the bond was given and taken.

As to the execution of the bond, that point does not appear to have been at all considered by the judges in the court below. In regard to the question of delivery, there appeared to have been great difference of opinion among the judges ; but that was not now of much consequence, as Paterson seemed to have acted as the agent of the bank in the transaction, and delivery to him might be considered as delivery to the bank, though that fact might possibly be material with a view to the third point.

As to the construction of the instrument, I think it must be taken as extending to past as well as future transactions.

With respect to the third question, a case, though not exactly similar to the present, yet bearing a considerable resemblance to it, came before me in Ireland. A banking company at Dublin had trusted their clerk too far, and had not called him to account in the ordinary regular manner. He became indebted to them in a large sum, which he was unable to pay and they called upon his sureties. When the case came before me, the sureties contended, that the bank had not acted fairly by them in not calling upon the clerk to account in the ordinary regular manner, which if they had done, the *deficit* would have been much smaller, and perhaps the misconduct would never have occurred. I remarked at that time, that the principal ought to call upon the agent to account in the ordinary regular course of business ; and that it certainly was not acting altogether fairly by the surety to be negligent in this respect. One of the partners of the bank was in court at the time, and was so strongly impressed with the view which had been taken of the case, that he acknowledged that [ \*75 ] it was \*not dealing fairly by the surety, and so the matter ended, without any decision. He mentioned this merely to show that the surety had a right to expect from the principal, that there should be no negligence on his part ; and that he should not trust the agent beyond the ordinary bounds of prudence.

If, then, Paterson was the agent of the bank in taking the bond, it remained to consider the circumstances under which it was given, and certainly those stated by the noble lord (Eldon) were highly important and material. If a person had some doubts as to the circumstances of his agent, and therefore required fresh sureties, stating his doubts at the same time to these sureties, they would have no right then to complain though called upon to pay to the amount of their engagement. But if he suggested no doubt, but, on the contrary, required additional security

upon an alleged increase of business solely, concealing his doubts as to the misconduct of the agent, this was a species of proceeding which placed the person adopting it *in mala fide* in regard to the surety. If, then, it could be proved that the bank knew that Paterson was not trustworthy, or had good reason to believe so, and did not inform the sureties of their knowledge or suspicions on that head, but required security upon a ground which could not lead the proposed sureties to suspect that anything was wrong, and that ground too could be proved to have had no existence in fact, all these circumstances would unquestionably be material evidence; and I therefore concur in the opinion expressed by the noble lord on the woolsack.

After the cause returned to the court below, judgment was pronounced, repelling the reasons of reduction founded on the alleged defects of execution, on the ground that the pursuers having delivered the bond as properly executed, and binding on them, could not liberate themselves by showing that they had not executed it according to law, (see the case Jan. 25, 1821, F. C. ;) and this judgment was affirmed on appeal, June, 4, 1824. Thereafter a proof was allowed of the allegation as to the bond having been obtained by dole and improper concealment on the part of the bank. In addition to the evidence arising from the circumstances above narrated, that the bank \*were in the knowledge of, or had strong reason to suspect the situation of Paterson, and his misconduct as their agent, the pursuers adduced the following direct testimony. [\*76]

The widow of Paterson (who was now dead) deponed, that her husband had frequently communicated with her on the state of his affairs, and his appropriation to his own purposes of the money belonging to the bank, and that he had stated to her that he suspected the demand for additional security was made in consequence of the bank having come to the knowledge of the embarrassed state of his affairs, through the information of an individual now deceased.

Sir John Sinclair, who was one of the directors of the bank at the time when the additional caution was demanded, and belonged to that part of the country where the branch was situated, deponed, that the subject of the branch at Thurso had been frequently discussed at meetings of directors, and that it had been proposed to withdraw the branch altogether; but that it was agreed to continue it, provided additional security could be obtained; that he had communicated freely to Lord Armadale, another director connected with the same part of the country, his knowledge that Paterson was in embarrassed circumstances, which knowledge was founded on his having heard from good authority that Paterson had sustained considerable losses in speculations in grain, and that he thought he must have communicated this to the other directors; that the directors had put Paterson under restrictions, and were dissatisfied with his conduct, because he had not obeyed the order of the bank as to discounts, and had employed the money of the bank to his own private purposes, the manner of doing which was by discounting bills drawn by himself; and that though no plan of concealment or deception was formed by the directors, "they thought it was the duty of the cautioners to satisfy themselves as to Paterson's circumstances and conduct, and that it was

not incumbent upon the directors to give any information upon these subjects." It was further deponed to, that Mr. Ferguson, a law-agent, who had been sent by the bank to take charge of the branch shortly [ \*77 ] after Paterson's \*removal, and who was now dead, had stated that the bank had expressed much surprise at Mr. Paterson's having obtained the additional security; but it did not appear whether such expression of surprise had occurred before or after the full discovery of Paterson's conduct.

On the other hand, the bank showed that, down to the period when the discovery was made, they had remitted to Paterson large sums in bills and stamp checks, which he could turn into cash, amounting, from November 1803 to July 1804, to upwards of £15,000 in bills, and to £26,890 of stamp checks. They further showed, that as to one of the cautioners, Swanston, his name stood upon several bills discounted with the branch, to which Paterson was a party; and they contended, therefore, that he was not entitled to plead ignorance of Paterson's conduct as an agent in discounting his own bills, whereby he became in debt to the bank.

The lord ordinary, on advising cases, found "it sufficiently proved that circumstances were known to the directors of the Bank of Scotland, which made it not legal for them to ask and take additional security, prospective and retrospective, for Paterson's agency, merely as if on account of the death of some of his former cautioners, and the extent of the bank business at Thurso, without in any way informing or inducing inquiry by the additional cautioners regarding his conduct and situation," and therefore reduced and decerned in terms of the libel, adding this note:—"The lord ordinary has no idea that the bank directors did anything they thought in the least wrong, but believes their view of the law was different from that expressed in the house of lords, and which the lord ordinary adopts; and that they considered it finally and absolutely the duty of the intending cautioners to make all inquiries *ex proprio motu*, the bank directors having no duty in the matter, except to ask for caution in any way they pleased."

The court adhered.

[ \*78 ] LORD JUSTICE-CLERK.—I consider this a very important \*question in regard to the law applicable to cases of this kind. We are called to decide on broad principles of equity applicable to the situation of the parties at the time when the bond in question was granted, and to determine whether a bond, obtained as this was, is one of which the bank are entitled to avail themselves. The pursuers are permitted by the judgment of the house of lords to go into this investigation, and we are to decide whether they have proved sufficient to support the interlocutor. I am clearly of opinion that there is no ground to doubt that this bond covers past transactions; and that, in my opinion, is a very material ingredient. It is not a common bond, whereby cautioners become liable for future intromissions only, but also for all past transactions. Keeping this in view, and entertaining no doubt on the relevancy, that if the parties obtained the bond, being in the knowledge of past transactions on the part of the agent, which created great dissatisfaction

as to his proceedings, if they conceal these, they are not entitled to avail themselves of it, we have to consider the circumstances proved in this case. The first and most important is, what were the reasons assigned for demanding new and additional security? These are to be found in the letter of 20th December, 1803, which have been the medium of communication with the cautioners; and it is material that it is written within a month of Marshall's report. The words are, "The directors having had under review the cautionary bonds given by their agents, and finding that some of your cautioners are dead, and at the same time considering the present amount of your caution is too small for the business done at Thurso, they desire that the amount of your caution may be £10,000," &c. Now I cannot help observing that the death of some of the cautioners might require others in their room, but not additional security. Moreover, as to the business done at Thurso, it is material that there is no hint that Mr. Paterson's allowance was to be increased in consequence of the supposed increase of business. Then the question is, did this letter disclose the whole of the objects the bank had in view in making the demand; or were there any circumstances in Paterson's past transactions known to them, which they should have communicated to the cautioners? For any person who saw that letter could discover \*nothing to lead him to suppose that the bank was dissatisfied [\*79] with Paterson's conduct. As to the proof of the knowledge of [the bank of such circumstances, part is direct, and great part circumstantial. I am not disposed to lay much stress on the inspection by Marshall in 1803; for although there were circumstances sufficient to have created considerable doubt as to the way in which Paterson was conducting the bank business and entering into other concerns, and which did attract the attention of the bank, still I do not think Marshall's report decisive, though it does establish that £4500 of this person's own bills were lying discounted at the bank. No doubt, it does hold out the probability of an increase of business; but it is material that, notwithstanding it is demonstrated, in consequence of the war, the bank saw the necessity of directing this agent, with others, to diminish the discounts, and therefore their business decreased. There is, however, other evidence more important, and in particular the depositions of Sir John Sinclair, one of the directors, and acquainted with Paterson and that district; and when one director is particularly acquainted with the district of an agent, of course he is particularly consulted as to that agency; and this observation applies both to Sir John and to Lord Armadale, who were in the management at the time. Now look to his evidence, and see how important it is. Prior to December, 1803, he was aware of the embarrassed circumstances of Paterson; and was not that material to communicate? It was most material; and he attended several meetings of the directors after Marshall's report, when this branch was discussed. The principal reason for the proposal of recalling the branch is, that the bank was dissatisfied with the conduct of the agent; and is this not an important circumstance? Is it impossible to suppose that Sir John did not communicate his knowledge of Paterson's circumstances to his co-directors. Sir John was examined again, and says that there was no

plan of concealment, but that the directors thought it was the duty of the cautioners to satisfy themselves as to the conduct and situation of Paterson. Now I cannot agree with his conclusion, as the bank was dissatisfied with the conduct of Paterson.

The evidence of Sir John is of extreme importance. The [\*80] \*reason of dissatisfaction by the bank is stated by him to have been Paterson's applying the money of the bank to his own purposes. Sir John's evidence demonstrates that the bank officers were in the knowledge of circumstances which I hold it to be clear they were bound to have communicated to the cautioners; and his evidence is strongly corroborated by that of Mrs. Paterson. The other material evidence is the testimony of Mr. Sim's letter of 14th July, 1804, which proves that suspicions were entertained of Paterson previous to the discovery then made. As to the evidence of the astonishment expressed by the bank, it is no doubt rather circuitous. But Mr. Ferguson went to Thurso on a special commission, and as confidential agent, and I do think it an ingredient of evidence. Then these facts being proved, and the knowledge brought home to the bank, were they, in the language of Lord Mackenzie, in the knowledge of "circumstances which made it not legal for them to ask and take additional security, prospective and retrospective, without in any way informing or inducing inquiry by the additional cautioners regarding his conduct and situation?" And I beg to say, that, looking to those principle of equity which must regulate every transaction of this kind, I have come to the same conclusion with his lordship; and although I also agree with the observation in his note, that the bank had no improper purpose, yet they are not entitled to avail themselves of the bond got on the assigned reasons in the letter; and concurring in the views of law taken in the house of lords, I think the interlocutor should be adhered to. I have not overlooked that one of the cautioners is said to have been engaged with Paterson in some of these transactions. But what I desiderated here was sufficient evidence of Swanston being accessory to these malpractices, and I do not see any evidence.

LORD GLENLEE.—I am of a totally different opinion. There can be no doubt of the relevancy of the charge as remitted by the house of lords. The only question here is, whether the facts to which that doctrine applies are established? The doctrine is just stated by the lord chancellor; and the question is, whether the bank had, or might have [\*81] had grounds to \*hold Paterson not trustworthy, and got the bond on a different pretence? And if I were satisfied that this was the case, I could not concur in the observation in the note, that the directors meant nothing wrong, for I think they would have been very wrong. In the secretary's letter requiring additional security, there is no insinuation of any increase of business at the Thurso branch. It is only from the existing extent of business that £5000 was not considered an adequate security. Now, there is every reason to believe that this was no false pretence; for we see bills discounted to the amount of about £6000 per month, making the whole for which Paterson was responsible of such an amount, that there was nothing unreasonable in the bank say-



ing it was too much to be trusted on caution for £5000; and it was another fair consideration, whether the circumstances of the agent were such as made him a responsible person himself, and this was affected by his being engaged in other businesses; yet it would have been unnecessary to tell Paterson himself, in a private letter, that his speculations rendered it necessary to have larger security. Then, what inference could the bank draw from Marshall's report? I rather think favourable to the bank continuing Paterson. There is nothing in it, at least, to make the bank think him not trustworthy. The next point is, what subsequent information had they before the bond was signed? Nothing whatever inferring that Paterson was not trustworthy. I see there was a large amount of Bank of Scotland notes in hand, but there is nothing to show that the directors had any notion that they were not in the cash-chest. Then Sir John Sinclair's evidence just amounts to this, that there was a great extent of business, and Paterson's being engaged in other concerns was the principal reason for being dissatisfied. No doubt, he says, the directors were dissatisfied, because he applied money to his own purposes; but he explains that as only done by discounting bills on which his own name appeared, and this was done openly, and afforded no ground to suspect anything untrustworthy; and in the correspondence he is not specially admonished not to discount his own bills, and there was no necessity to communicate that which must have been notorious in that part of the country. So that all the bank did not \*com- [\*82] municate was what was open to the whole world as well as the bank, who were not called on to say anything about such matters; and so I think there is a deficiency of evidence on the part of the pursuers. The only other thing is the surprise said to have been expressed by the directors at Paterson's getting cautioners. There is nothing, however, in the hearsay evidence to show that the expressions of surprise were uttered till after the discovery, and there is no reason to suppose they had heard anything about it till after that. Now, after knowing this, and the extent of Paterson's bankruptcy, it is not extraordinary that they should express surprise that people in the same county should have come forward as cautioners, although I certainly am not surprised, as their interest was very great to keep a branch in that part of the country; and, besides, their having expressed surprise is very inconsistent with the idea of a trick, as they would rather have held their tongue, which might have given room for an argument, such as that brought forward as to Fraser writing a mere official letter in answer to that of Mr. Sim, and expressing no surprise in it. Farther, we see the extent to which the bank trusted Paterson in other matters independent of the Thurso branch, which shows no suspicion of impending bankruptcy. As to the urgency to get the bond executed, it might have afforded room for an argument, if it had been a new bond; but as it was to remedy a defect *ex intervallo*, it was material and proper to lose no time at all, as the death of a witness might have prevented the possibility of ever getting it done. On the whole, I think there is not sufficient evidence to warrant the interlocutor of the lord ordinary.

Lord PITMILLY.—Though the principles of equity on which this

question is to be decided are clear, yet they are new in this court, and it is satisfactory that we have the opinions of the house of lords on the point. In certain circumstances, a bank is bound to give information to intending cautioners. Thus, if the bank had not asked the bond till after Sim's report, they would undoubtedly have been bound to communicate; and we must examine the evidence minutely, and see whether [ \*83 ] the circumstances known were such as to oblige them to \*communicate. It is an important consideration that the additional security was not asked for a stranger, but for one who had been nine years agent, and that it was to cover past transactions, which could only be known to themselves; and was it of no consequence whether he owed money to the bank, and they were dissatisfied with him? The state of transactions must have been known to the bank, and could not be known by the cautioners, unless they were communicated by the bank; and it is to such a case as this that we are to apply the legal principles emphatically laid down in the opinions delivered in the house of lords. What is the concealment there intended, but concealment of facts of which it is of advantage to the one party that the other should be kept ignorant? The opinions do not limit the case to that where the bank might suspect untrustworthiness, but point out as the important consideration, whether the agent owes the bank large sums of money, or they have reason to suppose he does so. When we come to apply these principles, I think they do apply to this case. The letter from the bank requiring additional security must have been the channel of communication to the cautioners, who must have believed that the reasons expressed there were the only reasons for requiring additional caution. Now, was this the fact? Nothing like it. I will not go over particulars; but Marshall's report is strong. The circumstance of Paterson's being obliged to draw so many bills just shows that the cautioners should have been informed. Sim's letter is also a strong piece of evidence as to the previous suspicions of the bank. The evidence of Sir John Sinclair strikes me in the same light with the lord justice-clerk. I do not go on the evidence of the bank's surprise. It is very doubtful, and I do not rest on it; nor do I think the bank bound to communicate the extent of Paterson's dealings as a corn-merchant, because the cautioners should have known this themselves. I found on a statement of Lord Mansfield, as laying down the regulating principles of all contracts, in the following words:—"The governing principle is applicable to all contracts and dealings. Good faith prohibits either party, by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary."—*Carter v. Boehm*, 3 Burrow, [ \*84 ] 1905. \*This opinion was given in an insurance case; but it was given as doctrine applicable to all dealings. I agree with the lord ordinary, that the bank intended to do no wrong; but I still hold with him, that it is sufficiently proved that circumstances were known to the bank which made it not legal for them to take the additional security without communication to the cautioners. It is asked what the bank should do? They might have inserted in the bond, "as

the agent is in arrear, or likely to be in arrear." This would have been very different.

Lord ALLOWAY.—I concur with Lords Justice-Clerk and Pitmilley.

#### IV.—RAILTON v. MATHEWS.

Jan. 31, 1844.—S. 6 D. 536. House of Lords, April 18, 1844. 3 Bell, 56.

In January, 1833, Oliver and Mathews, drysalters in Bristol, began to employ Mr. George Hickes as commission agent for the sale of their goods in Glasgow. Down to February, 1834, there was associated with him in this employment a gentleman of the name of Rowley; but at that period their partnership was dissolved, and Hickes received the sole appointment as agent for the Bristol house. It was made a condition of Hickes's appointment as sole agent, that he should find security for his future management and intrusions; this, however, was not complied with till March, 1835, when a bond was drawn out and signed by Hickes and Edward Railton; writer in Glasgow, a friend of Hickes, as one of the cautioners; it was not, however, executed by Henry Williams Hickes of Worcester, the other proposed surety. In the meantime a change had taken place in the firm of Oliver and Mathews, by the retirement of two of the partners, and the assumption of a new partner in 1835, under the firm of Mathews and Leonard. Accordingly, a new bond of caution for £4000 was drafted in England, and sent down to an agent in Glasgow to be executed. The bond set forth,—“Whereas the above named Thomas Gad Mathews \*and Robert Leonard, have lately [\*85] admitted the above bounden George Hickes into their service, as their clerk and commission agent, and have agreed to retain and continue him in said service, on his obtaining two respectable parties to become sureties for his duly and faithfully accounting to them,” &c. This bond was signed by Railton on 21st September, 1835, and likewise by the other parties. Thereafter Hickes continued to act as agent for Mathews and Leonard till May, 1837, when some circumstances having occurred to excite their suspicion as to his fidelity, one of the partners proceeded to Glasgow, where it was discovered that his actings had been dishonest, and that he had peculated their funds to a large amount. On making these discoveries, they gave notice to the sureties, and put a stop to the agency. Hickes was shortly afterwards sequestered.

Thereafter Mathews and Leonard raised an action upon the bond against Hickes and Railton, and H. W. Hickes, the cautioners. Railton then brought a reduction of the bond on the ground,—“that the said pretended bond was obtained fraudulently by the said defenders, and in the procurement thereof they were guilty of a fraudulent concealment of material circumstances known to themselves, and deeply affecting the credit and trustworthiness of the said George Hickes;” that the dissolution of the copartnership of Rowley and Hickes, was in consequence of fraudulent conduct on his part, which had been distinctly communicated to

the defenders at the time; that their confidence in him having been shaken by this communication, they had resolved to exact security from him, and had therefore made it a condition of his re-appointment; that, in consequence of the culpable neglect of the defenders in not executing regular remittances, and making periodical settlements with him, he was, at the time of the granting of the bond, in arrear to the extent of £2882; that, although from these circumstances the defenders were aware that Hickes was unworthy of trust, yet they failed to communicate them to the pursuer; and, on the contrary, while they took possession of the bond, fraudulently concealed the whole facts regarding his irregularities, and [\*86] by their whole conduct in the premises \*misled him (the pursuer) into the belief that Hickes was in every respect trustworthy, while they knew the reverse; whereby the bond was obtained by them by fraud and deceit, and undue concealment of material facts which they knew, and which, if communicated, would have prevented him from subscribing the bond; and further, that although from the date of the bond to that of his bankruptcy Hickes's irregularities continued, yet they fraudulently concealed his conduct and the state of his accounts from the pursuer.

*Pleaded for the Pursuer*;—1. The bond under reduction having been elicited and obtained from the pursuer by fraud and deceit on the part of the defenders, or one or other of them, and by their having fraudulently concealed or failed to communicate to the pursuer the facts and circumstances specified in the summons, which were known to them at the time, and deeply affected the credit or trustworthiness of George Hickes, and which, if known to the pursuer, would have prevented him from undertaking the obligation in question, is therefore null and void, and ought to be set aside under the reductive conclusions of the summons.

2. *Separatim*. The defenders having, on the occasion of obtaining the said bond, fraudulently concealed from, or failed to communicate to, the pursuer, the fact that George Hickes was a defaulter to them for a large balance on the old accounts of his previous agency, the said bond is therefore null and void, and ought to be reduced and set aside as aforesaid.

3. The defenders having suffered George Hickes to go on in a course of irregularities and misconduct in the business entrusted to him under the agency, without adopting any effectual means to enforce a correct discharge of duty on his part, and having fraudulently, or by gross negligence, concealed from, or failed to communicate to the pursuer, the particulars of Hickes's misconduct, or any part thereof, have thereby lost all recourse against the pursuer under the said bond, and the same has become void, inoperative and ineffectual, and the pursuer is entitled to decree to that effect under the declaratory conclusions of the libel.

[\*87] \*The defenders, in answer to the pursuer's allegations, denied the existence of irregularities on the part of Hickes prior to May, 1837, at least of such as to justify suspicion of his unfaithfulness.

The reduction was conjoined with the action at the instance of Mathews and Leonard, and issues were prepared in both cases.

The issue in the reduction was,—

“It being admitted that on the 21st day of September and 10th day of October, 1835, the bond of caution and surety, No. 3 of process, was subscribed by the pursuer Edward Railton, George Hickes of the city of Glasgow, and Henry Williams Hickes of the city of Worcester; and it being further admitted that the said George Hickes acted as agent for the defenders Mathews and Leonard from the date of the said bond to the month of May, 1837,—

“Whether the pursuer Edward Railton, was induced to subscribe the said bond of caution or surety by undue concealment or deception on the part of the defenders, or either of them.”

The cases were tried before the Lord Justice-Clerk on 31st July and 1st August, 1843, and a verdict was returned in both cases for Mathews and Leonard.

In the reduction the Lord Justice-Clerk stated to the jury the nature of the question which was submitted to them for trial in the issue, and called their attention to the point, that one part of the question was, whether, as a matter of fact, the pursuer “was induced” to subscribe the bond of caution by undue concealment or deception, and that they must be satisfied that the undue concealment or deception was the efficient cause of his signing the bond. But at the same time that this cause was to be understood and applied by them under this qualification, viz., that undue concealment may consist wholly in non-communication. Hence if a party under such a duty of communication as he should afterwards explain, in relation to the position of the defenders, did not make the disclosures which \*the jury might think he ought to have done, of matters which, if communicated, might have prevented [\*88] the pursuer signing the bond, then the fact of concealment of what might have led the pursuer not to sign the bond, may be taken to have induced him to sign, although the immediate motive of his doing so was a desire to assist a friend: And in the course of this charge, the Lord Justice-Clerk directed the jury, that under this issue the concealment must be, 1st, Of things known to the defenders, or which they had strong or grave ground to suspect; and 2dly, That the concealment therefore being undue, must be wilful and intentional, with a view to the advantage they were thereby to receive: And in reference to the plea maintained by the pursuer, viz., that under this issue he was entitled to a verdict, if there was ignorance on the part of the defenders from neglect on their part in inquiring into and not discovering matters which might have been discovered by investigations in Glasgow, and that the same consequences must fall on the defenders as to the nullity of the bond from ignorance in such circumstances as from undue concealment of facts known to them, the Lord Justice-Clerk further told the jury that such was not the principle of law applicable to the case, or admissible under the terms of the issue; that the issue referred expressly to undue concealment, and not to any neglect on the part of the defenders to discover what it might be shown they might have found out before the date of the bond, but the existence of which nothing had led them to suspect,

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if the jury were satisfied that nothing had occurred to create suspicion on the part of the defenders.

To this charge the pursuer excepted.

In support of the bill of exceptions it was argued;—1. The charge of the judge was erroneous, in so far as the jury were directed, that the concealment, to be undue, must be wilful and intentional, with a view to the advantage which the defenders were thereby to receive. It was not requisite to constitute the undue concealment in the issue that the concealment should be wilful and intentional for the purpose of obtaining the bond. It was sufficient if the fact concealed was one which it was material for the pursuer to have known, and which might have [ \*89 ] induced him not to have subscribed the bond; and non-communication of this fact on the part of the defenders constituted undue concealment, *Smith v. Bank of Scotland*, Jan. 14, 1829, ante, p. 66. The case depended on the same principles as those established in regard to contracts of insurance, where a failure to disclose important facts, although innocent, had the effect of vitiating the contract,—*Carter v. Boehm*, 3 Burrow, 1905.

2. The charge was further erroneous, in so far as it negatived the plea maintained by the pursuer, that he was entitled under the issue to a verdict, if there was ignorance on the part of the defenders, from neglect on their part in inquiring into matters which might have been discovered by investigations in Glasgow, and that the consequences must be the same as to the nullity of the bond from ignorance on their part in such circumstances, as from undue concealment of facts known to them. This part of the pursuer's case was founded on the supposition that the defenders were not in possession of information which they might have easily obtained, and which, had it been communicated, would have prevented the pursuer from signing the bond. The pursuer, in the transaction, was dealing with Hickes's masters—the parties in whose service he had been for some time previously, and he was entitled to rely that where the service had continued for so long a period, the defenders had exercised the means of inquiry open to them as to his honesty. In the capacity in which they dealt with the pursuer they were bound to have known his character. Had Hickes carried on for a length of time a system of fraud which they might have discovered by the most ordinary attention to their affairs, would it be necessary that the pursuer should be obliged to bring home to them knowledge of that dishonesty?

*The defenders answered*;—1. The law of insurance had no application to the present case. Insurance was effected on the statement of the party applying, and any concealment on his part caused an error in *substantialibus* of the contract. The case was different as regarded a cautioner. A party becoming cautioner was supposed to know something of the party for whom he comes forward; it is for his behoof also that he comes forward. The laws of caution and of insurance, therefore, [ \*90 ] start from a different point. The caution in the present case was for future conduct not for past; the defenders were required to have stated circumstances connected with past balances which never awakened suspicion in their minds. Even independently of the terms

of the issue, the charge was in principle correct; but the question to be tried had been definitively settled by the terms of the issue, which must be held to have fixed all questions of relevancy and law. The words of the issue were "undue concealment;" this implied something intentional, more than a mere failure to communicate. The issue ought to be construed as "undue concealment to induce," &c.

2. Under the second branch, the pursuer carried his argument a great deal further. He maintained, that while the defenders were perhaps themselves the victims of the deception of the party whose character the pursuer undertook to warrant as good, they were to be liable for facts which they did not know of, or even suspect; and this, too, was brought in under the words "undue concealment."

The court disallowed the bill of exceptions.

The pursuer having appealed, it was "Ordered and Adjudged, That the interlocutors complained of in the appeal be reversed; and it is further ordered and adjudged, that the bill of exceptions referred to in the said interlocutor of the 31st of January, 1844, be allowed, and that a new trial be granted; and it is also further ordered, that the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this judgment."

LORD COTTENHAM.—My lords, this is an appeal from a judgment of the court below. Entertaining an opinion against the judgment pronounced there, if I had felt any doubt upon the subject, or had considered it a case which required more investigation of the facts than it has received, I certainly should have been unwilling to dispose of it without taking time for further consideration, but the facts are so simple, and the points are so free from doubt, that I see no reason why the house should not at once dispose of the case.

\*My lords, the real question is, whether the way in which the learned judge put this case to the jury, and described to them [ \*91 ] the duty they had to perform, was or was not consistent with and properly applicable to the question, and the issue raised for their consideration? The issue, in my opinion, very clearly describes the point which the court wished to have investigated. The terms of the issue must of course be construed as they stand, but it is not immaterial to look to the points raised in the pleadings for the purpose of construction. If there were any doubt upon the meaning of the terms used, I would look to the summons for the reduction of the instrument of suretyship, and I find several facts appearing as having passed between the party who was the subject of the suretyship, and those by whom he had been previously employed, and I find the matter stated in these terms, "That the parties totally failed to communicate the said circumstances, or either of them, or the existence of any balance on the agency accounts standing against the said George Hickes to the pursuer, or to the said Henry Williams Hickes; and, on the contrary, while they accepted and took possession of the said bond, they fraudulently suppressed and concealed the said whole facts and circumstances regarding the conduct and irregularities of the said George Hickes."

There is an imputation made of direct fraud, a fraudulent intention

influencing the acts of the parties; and there is a direct statement of concealment.

It has not been contended, and it is impossible to contend, after what Lord Eldon lays down in the case of *Smith v. The Bank of Scotland*, that a case may not exist in which a mere non-communication would invalidate a bond of suretyship. Lord Eldon states various cases in which a party about to become surety would have a right to have communicated to him circumstances within the knowledge of the party acquiring the bond, and he states that it is the duty of the party acquiring the bond to communicate those circumstances, and that the non-communication, or, as he uses the expression, the concealment of those facts would invalidate the obligation and release the surety from the obligation into which he had entered.

[\*92] \*Now, when the issue in this case was tried, such being the points raised between the parties, we have nothing to do with the evidence in the cause or the facts proved, or the conclusion to which the jury might or might not have come, under the circumstances, but with the question whether the charge which was made to them was such a charge as we conceive ought to have been made to them. The issue for their consideration was, as a matter of fact, "whether the pursuer, Edward Railton, was induced to subscribe the bond of caution or surety by undue concealment or deception on the part of the defenders, or either of them?" raising these two propositions which were raised in the pleadings in the cause, either of which, if found in the affirmative, would lead to the conclusion of the cause.

The question, looking at the terms in which the matter was left to the jury, and the mode in which the learned judge informed the jury they ought to perform their duty, is whether there may not have been a case brought before the jury for their consideration, of improper and undue concealment, which I understand to mean a non-communication of facts which ought to have been communicated, which would lead to the relief of the surety, although the non-communication might not be wilful and intentional, and with a view to the advantage which the party was thereby to receive. That which I find here extracted from the charge of the learned judge, I understand to be one proposition. The learned judge lays it down distinctly, that the concealment to be undue must be wilful and intentional, with a view to the advantage they were thereby to receive. In my opinion there may be a case of improper concealment, or non-communication of facts, which ought to be communicated, which would affect the situation of the parties, even if it is not wilful and intentional, and with a view to the advantage the parties were to receive. The charge, therefore, I conceive, was not consistent with the rule of law. I think that it narrowed the question for the consideration of the jury beyond the limits which the rights of the parties required to have submitted to the consideration of the jury.

Without going further into the law which regulates the rights of these parties than that which was stated by Lord \*Eldon in the case [\*93] of *Smith v. The Bank of Scotland*, we find that in a judgment of this house, in the case of an appeal from Scotland, and therefore one



peculiarly valuable in the case now under consideration, that has been declared to be the law. The terms used by the learned judge in directing the jury having limited the question for their consideration much more than the rule of law would justify, it appears to be quite clear that this case has not been properly tried, that the exceptions were properly taken, and that this house is bound to pronounce such a judgment as ought to have been pronounced by the Court of Sessions.

Lord CAMPBELL.—My lords, this case has been very satisfactorily argued on both sides with great brevity, but everything has been urged which could be for the advantage of the clients, or the assistance of your lordships; and having listened to all which has been urged on both sides very attentively, I, without the smallest hesitation, come to the conclusion that the bill of exceptions ought to be allowed, and that there must be a new trial.

The question really is, What is the issue which the court directed in this case; “whether the pursuer, Edward Railton, was induced to subscribe the said bond of caution or surety by undue concealment or deception on the part of the defenders, or either of them?” The material words are, “undue concealment on the part of the defenders.” What is the meaning of those words? I apprehend, my lords, the meaning of those words is, whether Railton was induced to subscribe the bond by the defenders having omitted to divulge facts within their knowledge, which they were bound, in point of law, to divulge. If there were facts within their knowledge, which they were, in point of law, bound to divulge, and which they did not divulge, the surety is not bound by the bond; there are plenty of decisions to that effect, both in the law of Scotland and the law of England. If the defenders had facts within their knowledge which it was material the surety should be acquainted with, and which the defenders did not disclose, in my opinion, the concealment of those facts—the undue concealment of those facts—discharges the surety; and whether they concealed those \*facts from one motive or another, I apprehend, is wholly immaterial. It [\*94] certainly is wholly immaterial to the interest of the surety, because, to say that his obligation should depend upon that which was passing in the mind of the party, requiring the bond, appears to me preposterous, for that would make the obligation of the surety depend on whether the other party had a good memory, or whether he was a person of good sense, or whether he had the facts at the moment in his mind, or whether he was aware that those facts ought to be disclosed. My lords, the liability of a surety must depend upon the situation in which he is placed, upon the knowledge which is communicated to him of the facts of the case, and not upon what was passing in the mind of the other party, or the motive of the other party. If the facts were such as ought to have been communicated,—if it was material to the surety that they should be communicated, the motive for withholding them, I apprehend, is wholly immaterial.

Then we come to the direction given by the learned judge. The learned judge says, “The concealment, therefore, being undue, must be wilful and intentional, with a view (that is, with reference to the motive)

to the advantage they were thereby to receive." Now, according to my notion of the issue, that is an entire misconception of it. According to this direction, although the parties acquiring the bond had been aware of the most material facts, which it was their duty to disclose, and the withholding of which would avoid the bond, if they did not wilfully and intentionally withhold them—that is to say, if they had forgotten them, or if they thought, by mistake, that, in point of law or morality, they were not bound to disclose them; then, according to the holding of the learned judge, it would not be concealment. But the learned judge does not stop there, but he goes on "with a view to the advantage they were thereby to receive," introducing those words conjunctively, and in effect saying, that it was not an undue concealment, unless they had their own particular advantage in view. That appears to me a misconception. I will suppose that their motive was kindness to Hickes, to keep back from those who it was material to him should continue to have a good opinion of him, the knowledge of those facts, that it was [ \*95 ] \*from pure kindness on their part to prevent those parties entertaining a bad opinion of him, and not from any selfishness, this concealment took place. Although that might be the motive, yet the fact that he was in arrear, and had been guilty of fraudulent conduct, and that he was a defaulter, were facts which it was most material for the surety to be acquainted with. If these were held back, merely from a kind motive to Hickes, and not at all from any selfish motive on the part of those to whom the bond was to be executed, the effect, in point of law, would be the same as if the motive were merely the personal benefit of the parties to receive the bond. It appears to me, therefore, that the learned judge has misunderstood the meaning of the issue, and that having told the jury that a concealment to be undue must be wilful and intentional, with a view to the advantage which the parties were thereby to receive, that was a misdirection, and that it had a tendency to mislead the jury; that it was wrong in point of law, and that the exception to that direction ought to be allowed.

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In the case of the Royal Bank of Scotland v. Ranken, July 20, 1844, 6 D. p. 1418, it was held that in order to liberate a cautioner on the ground of misrepresentation or concealment, it was not necessary that it should be wilful or fraudulent, but only that it should be such as must be presumed to have influenced him to undertake the obligation of cautioner. Lord MACKENZIE observed,—"I hold the law to be cleared by the reversal in the case of Railton, showing that concealment may be undue, and void an obligation of cautionary, though it be not made with a fraudulent motive, if it be such as to cause the cautioner to view the case in a false light." Lord JEFFREY observed,—"It is no doubt quite true, that a creditor who requires a cautioner along with his principal debtor, or to whom such a security is offered, is no way bound to make any representation to such proposed cautioner, or to give him any warning or information as to the extent of the risk he is undertaking. But then, if he does make any such representation, he must take care that it is a fair and full one; [ \*96 ] and if he either conceals any facts which obviously and \*materially affect the risk, and still more, if he in any way so misrepresents those facts, whether intentionally, or from mere blunder and carelessness, as necessarily to

mislead the cautioner as to the hazards of his undertaking, then certainly the cautioner must be liberated, and can never be held to an obligation substantially different from that held out to him. This I take to be now very clearly the law of all such cases ; and after the recent clear and authoritative exposition of it, in that of *Railton*, it would be idle to say more on the subject."

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ANY ALTERATION IN THE CONTRACT WITH THE PRINCIPAL WITHOUT THE CONSENT OF THE SURETY, BY WHICH HIS SITUATION WAS MADE WORSE, DISCHARGES THE LIABILITY OF THE SURETY ; BUT MERE FORBEARANCE BY THE CREDITOR TO EXACT PAYMENT FROM THE PRINCIPAL WILL NOT HAVE THAT EFFECT.

### I.—LEWIS v. JONES.

Trinity Term, 1825.—E. 4 B. & C. 506. Eng. Com. Law Reps., vol. 10.

THIS was an action on a promissory-note for £150, dated the 15th of March, 1821, made by one William Walter Jones, payable two months after date to the defendant, and by him indorsed to the plaintiff. At the trial before Garrow, B., at the last Spring Assizes for the county of Hereford, it appeared that William Walter Jones, the defendant's brother, being indebted to the plaintiff, the defendant G. B. Jones, for the accommodation of his brother, became a party to the note in question. It was proved by a witness who, on behalf of the plaintiff, had applied to the defendant for payment after the note became due, that he had said he would call and settle it, but at the same time asked the witness to request the plaintiff to suspend proceedings until an investigation of his brother's affairs had taken place, and that he should be much obliged to the plaintiff if he would get what he could from his brother, and relieve him, the defendant ; that, at a subsequent time, the witness saw the defendant again, and told him that the plaintiff would have nothing to do with his brother, as he had left the country, and that he should look entirely to the defendant ; that the defendant then said that [ \*97 ] one Morgan, an auctioneer, had investigated his brother's affairs, and had ascertained that there would be five shillings in the pound for the creditors. It was further proved by the same witness, that the plaintiff and defendant afterwards met together, and that the defendant told the plaintiff, that as he had signed an agreement for a composition of five shillings in the pound, he was not entitled to the whole debt, but that the defendant would give him a note for fifteen shillings in the pound : that the plaintiff then said that he had signed the agreement for composition, on the understanding that all his brother's creditors would come forward and sign the agreement, and accept the composition ; but that as they had not done so, he considered the agreement to be null and void. It appeared further, on the cross-examination of this witness, that the plaintiff told him he had signed the agreement for composition on the faith

of the promise of the defendant that he would pay the remaining fifteen shillings in the pound. For the defendant it was proved that, at a meeting of William Walter Jones's creditors, on the 29th May, 1824, the plaintiff signed the following paper:—"We, the undersigned creditors of William Walter Jones, agree to accept of five shillings in the pound, in full of our original demands against him, on having a joint note from him and his father, William Jones, payable in twelve months from the date hereof." The father and W. W. Jones gave their joint note to the plaintiff, in pursuance of the agreement. Another witness swore that Morgan, as agent of W. W. Jones, at the meeting of creditors convened for the purpose of signing the agreement for composition, stated that unless all the creditors signed, the paper was to go for nothing; and that the defendant, notwithstanding that the plaintiff signed the agreement, would continue liable for the residue of the debt, secured by his note. The learned judge told the jury to find for the plaintiff if they thought that he was induced by any false representation to sign the agreement, otherwise to find for the defendant. The jury having found a verdict for the plaintiff, a rule *nisi* for a new trial had been obtained in last Easter Term, upon the ground that by the agreement for composition, [ \*98 ] and the plaintiff's acceptance of \*the joint note from W. W. Jones and the father, the original debt was extinguished, and that the surety was therefore discharged.

*Russell* and *R. V. Richards* now showed cause.—The debt due from the defendant to the plaintiff upon the promissory note was not extinguished by the agreement for composition. At the time when the agreement was signed, the note was an existing security, and there was no stipulation that it should be given up. On the contrary, there was an express undertaking by the defendant that it should continue in force against him, and a request by him that the plaintiff would obtain all he could from the principal debtor. It is true, that a creditor, by entering into a composition with the principal debtor, without consent of the surety, discharges the latter: yet that rule is founded on the principle that it is against conscience that persons should be placed in a situation in which they have not contracted to be placed. Here the surety had contracted to be placed in that situation. There is no doubt that if a new security had been given for the payment of anything beyond the composition money, it would have been void,—*Cockshott v. Bennett*, 2 T. R. 763; *Stock v. Mawson*, 1 Bos. and Pul. 286. But this is more like the case of *Thomas v. Courtenay*, 1 B. and A. 1, where the creditors of an insolvent agreed by an instrument (not under seal) that they would accept, in full satisfaction of their debts, twelve shillings in the pound, payable by instalments, and would release him from all demands, and it was held that the agreement did not extinguish the debt, and did not discharge a surety for it. Besides, here the question as to the extinction of the debt does not arise, for the jury have found that the plaintiff was induced to sign the agreement by a delusion practised upon him. It is clear that a creditor is not bound by an agreement for composition, if any misrepresentation has been used to obtain his consent, *Cooling v. Noyes*, 6 T. R. 263. Now here there were two most material

misrepresentations made by the agent of the principal; first, that the surety would continue liable for the residue of the debt secured by the promissory note, notwithstanding the agreement for composition; and, secondly, that the agreement would be void, unless \*all the creditors came forward and signed. Now, if the original debt was extinguished, [\*99] (as contended by the defendant,) the first representation was false. In fact, several of the creditors did not sign, and, if the agreement be valid, the second representation also was false, and such misrepresentations make the deed void *ab initio* on the ground of fraud. [BAYLEY, J.—Is not the effect of these representations to show the legal effect of the instrument to be different from what it appears to be, and if so, were they admissible in evidence?] The representations tend to show that the agreement is void *ab initio* on the ground of fraud, and, therefore, that it has no legal effect whatever.

*W. E. Taunton and Campbell, contra.*—In *Cockshott v. Bennett*, 2 T. R. 763, one of the creditors, before he executed the agreement for composition, obtained from the insolvent a promissory note for the residue of his debt, and that was held to be void, inasmuch as it was a fraud on the other creditors, who had mutually contracted with each other, that the insolvent should be discharged from his debts, after the execution of the deed. Now the defendant in this case could only be liable to pay the debt in default of its not being paid by his brother. The effect of the composition, therefore, was to make the defendant's liability absolute, which before was only contingent. The defendant in case of paying this note to the plaintiff, would have his remedy over against W. W. Jones for money paid, this being an accommodation indorsement. Then the stipulation, that the debt should continue, was a fraud upon the father, who gave his promissory note on the faith, that it was to be received in full discharge of his son W. W. Jones. He was no party to that new contract, and, therefore, cannot be bound by it. In *Thomas v. Courtenay*, 1 B. and A. 1, the security, held to be available was an acceptance of a bill drawn by the principal debtor, and an acceptor is *prima facie* the debtor of the drawer; and in that case Bayley, J., said "If it could be made out that Colonel Gower had a remedy over against Baker and Son, that might have varied the case." Assuming that the defendant is discharged by the general law on this subject, the representations made that he would continue \*liable, notwithstanding [\*100] the signing of the agreement by the plaintiff, and that the agreement would be nugatory unless all the creditors signed, are immaterial, because, at most, they are representations merely as to the legal effect of the agreement, of which every party is presumed to be cognizant, and not mis-statements of the contents of the instrument. In the latter case, if the plaintiff had been induced to sign under an entire ignorance of what he was doing, it might have been a fraudulent transaction. But there is no pretence for saying that, for the plaintiff accepted the joint note, which was a new security from the father, under the composition. Having accepted this benefit, he cannot now repudiate the other consequences of it. Of these the principal one is to extinguish the debt, and to operate against all the parties signing, whether the other creditors

executed it or not, there being no stipulation to the contrary. These representations were not properly received in evidence, inasmuch as the effect of them was to contradict or to control the written instrument.

BAYLEY, J.—I think that there ought to be a new trial in this case. There can be no doubt, that if a creditor who signs a composition deed or agreement, and thereby induces other creditors to sign it, makes any private bargain, the effect of which is to place himself in a better situation than the other creditors, he thereby commits a fraud upon them, and that such private bargain is void. That is established by several authorities. It is unnecessary in this case to decide the question, whether a creditor who signs an agreement for a composition at the instance of a person jointly liable with the insolvent, and takes an engagement from that person that he will make up the difference between the debt due and the composition money, can have any remedy against the surety, because it has not been submitted to the jury in this case, whether there was such a bargain or not. The only question, therefore, is, Whether the plaintiff was induced by any fraudulent representation to sign the agreement? It was represented by the agent of the insolvent, to the creditors convened for the purpose of executing the agreement of composition, that the surety would continue liable, notwithstanding the agreement of the creditor to \*accept, in full, five shillings in the pound, [\*101] to be secured by the father. That, however, was a misrepresentation merely of the legal effect of the agreement. Now, every man is supposed to know the legal effect of an instrument which he signs; and, therefore, this must be taken to be a representation as to a fact within the knowledge of the creditor, and such misrepresentation will not have the effect of avoiding this instrument, because it was not calculated to mislead the creditor. But the agent of the insolvent also represented to the creditors, that the instrument would be void, unless all the creditors signed. There can be no doubt that an agreement for a composition ought to contain a clause to that effect, and that no man in his senses ought to sign such an instrument without it, for otherwise the object of the instrument may be defeated; but here there is not any clause in the agreement, or any memorandum attached to the signature of the plaintiff, by which he declares that he signs it upon that condition. If a party at the time when he signs an instrument annexes to his signature a condition that the deed is only to have effect against him in case all the creditors sign it, it will be void as to him, unless they do sign. But if he puts this condition on the face of the instrument, other creditors will not be induced to sign by seeing his signature, except upon the same terms which he has annexed to it; but if a creditor signs such an instrument generally, he becomes a party to it unconditionally, and then the legal effect of the instrument must be collected from the instrument itself, and not from verbal declarations made by the parties at the time when they executed it. On the face of this instrument the plaintiff has not annexed any condition to his signature, and that being so, I think that parole evidence of such a representation was not admissible, and, consequently, we are not warranted in saying that the instrument was null and void *ab initio*, on the ground that all the creditors

have not signed. That being so, the rule for a new trial must be made absolute.

HOLROYD, J.—I also think there ought to be a new trial. Although this be a case where the action is brought against a surety. It must be considered in the same light as if it was \*brought against the principal. If the original debt be satisfied and gone, no action [\*102] will lie against the surety. The extinguishment of the debt puts an end to the agreement of the principal and surety. Now unless the agreement for the composition can be got rid of on the ground of fraud, I think it operates as an accord and satisfaction of the original debt. The agreement imports that the creditors were to accept five shillings in the pound in full of their debts, &c. Now an acceptance of a smaller sum cannot be pleaded as a satisfaction of a larger. In point of law, something further is necessary to produce that effect. But I think that when the plaintiff in this case accepted the father's note as a security for payment of the composition-money, the agreement did operate as a satisfaction and as an extinction of the debt. *Steinman v. Magnus*, 11 East, 390. It has been contended that there was evidence to show that the defendant contracted that the debt due on the promissory note should continue against him. By the agreement for the composition, however, it is expressly stipulated that the sum of five shillings in the pound is to be accepted in full. Any parole evidence to show that the debt was not fully satisfied would go to contradict the agreement of the parties, and would, therefore, be inadmissible. It is not necessary, however, to decide that point. Here the father of the defendant was no party to such an engagement. He gave his note upon the faith that the agreement for composition was to be performed, and he was not privy to any agreement that the debt was to continue against the surety. To hold the surety now liable would operate as a fraud upon the father. With respect to the effect of the representations, if admissible, it may suffice to say that the plaintiff should have returned the note, if he intended to say that the agreement for composition was thereby rendered void.

LITTLEDALE, J.—I am of opinion, for the reasons already given, that this agreement was not void, on the ground that the plaintiff was induced to sign it by misrepresentation. It might be a question, whether an agreement, that the surety was to continue liable to the creditor, and that he should not afterwards have recourse to the principal debtor, would be valid, \*notwithstanding the creditor signed an agree- [\*103] ment to accept from the principal five shillings in the pound, in full satisfaction of the debt; but there was hardly evidence of such an agreement, and I incline to think, that if there was, it would not have been binding on the surety, for this reason, that if it were allowed to continue a debt against the surety, it would be a fraud upon the other creditors, who supposed they had contracted with each other upon equal terms. I think it better and safer to lay down as a general rule, that any private bargain, the effect of which is to give one creditor an advantage over the others, is void, the principle of composition being that all creditors shall stand on the same footing. Without, however,

giving any decided opinion upon that point, I think, for the reasons already given, that the rule for a new trial must be made absolute.

Rule absolute.

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The following note is appended to the report of the case of *Lewis v. Jones*,—  
 “Generally speaking, a creditor discharges a surety by giving time to or compounding with the principal debtor. The cases upon this subject may be divided into two classes; the first, where the agreement with the principal may be considered as a fraud upon the surety, by altering his situation or increasing his risk. Such were the cases of *Nisbet v. Smith*, 2 Br. C. C. 579; *Ex parte Smith*, 3 Br. C. C. 1; *Rees v. Berrington*, 2 Ves. Jun. 540; *Law v. E. I. Company*, 4 Ves. Jun. 824; *Eyre v. Bartrop*, 3 Mad. 221. The second, where allowing the creditor to recover against the surety would operate as a fraud upon the principal, or any person joining with him in paying or securing the composition-money, inasmuch as it would give the surety a right to proceed against the principal for that debt, from which the creditor had agreed to discharge him,—*English v. Darley*, 2 Bos. and Pul. 61; *Burke's case*, there cited by Lord Eldon, *Ex parte Gifford*, 6 Ves. Jun. 805; *Boullbee v. Stubbs*, 18 Ves. Jun. 20; *Ex parte Glendinning*, Buck, 517. It is obvious that the first ground of discharge [ \*104 ] is inapplicable where the agreement between the creditor and principal debtor is made with the privity and assent of the surety; and it seems that the second is inapplicable where the surety becomes a party to the transaction in such a manner as to deprive himself of any remedy over against the principal, in the event of his being called upon to pay the residue of the debt. Where a surety compels the creditor to sue, or prove under a commission of bankruptcy against the principal, he is considered as electing to stand in the situation of the creditor with respect to the remedy against the principal, and in order to do so must bring the debt into court,—*Beardmore v. Cruttenden*, Co. Bank Laws, 211; *Dict. per Ld. Ch. in Wright v. Simpson*, 6 Ves. Jun. 734. Hence it may follow that if a creditor, at the request of the surety, and for his relief, agrees to accept a composition from the principal, the surety would be considered as electing to stand in the situation of the creditor, and that he could not recover over against the principal upon being compelled to pay the residue of the debt. In *Ex parte Glendinning*, Buck, 517, the Lord Chancellor is reported to have said that a creditor entering into an agreement for a composition with a debtor, and wishing to retain his remedy against a surety, must cause the reservation to appear upon the face of the agreement, for that parole evidence cannot be admitted to explain or vary the effect of the instrument. If that observation is to be construed generally, it will greatly simplify questions upon this subject; for then, wherever a creditor and principal debtor have entered into an agreement for a composition, not containing a reservation of the remedy against a surety, and an action is afterwards brought against the latter, it will be unnecessary to inquire whether he was or was not privy and consenting to the agreement, or whether he has or has not done anything to deprive himself of the right to recover over against the principal; he will be absolutely discharged by the agreement entered into between the creditor and the principal debtor. But the judgment in *Ex parte Glendinning* appears to be founded upon *Burke's case*, which is also cited by the lord chancellor in *Ex parte Gifford*, 6 Ves. Jun. 809, as an authority for saying that where the remedy against the surety is reserved in the agreement for composition, a recovery against the surety cannot operate as a fraud upon the principal; for that if demand out of that recovery arises against him, it is with his own consent. Perhaps, therefore, the observation in *Ex parte Glendinning* was intended to apply to those cases only where, but for the reservation in the agreement, the proceeding against the surety would operate as a fraud upon the principal, and parole evidence may still be admissible to show that the composition was made with the privity and at the request [ \*105 ] of a surety, and that he has deprived himself of any \*right to recover over against the principal; for such evidence would leave the written



instrument (according to its import) a discharge to the principal, and would not contradict it, unless indeed it be so framed as to extinguish the debt. There is another large class of cases in which it has been held that a person joining other creditors in compounding with a debtor, or signing a bankrupt's certificate, cannot lawfully stipulate for any benefit to himself beyond that which the other creditors receive; whether that benefit be given by the debtor himself or any third person for his relief,—*Smith v. Bromley*, 2 Doug. 695; *Cecil v. Plaistow*, 1 Anstr. 202; *Cockshott v. Bennett*, 2 T. R. 763; *Jackson v. Lomas*, 4 T. R. 166; *Feise v. Randall*, 6 T. R. 146; *Jackman v. Mitchell*, 13 Ves. 581; *Leicester v. Rose*, 4 East, 372; *Wells v. Girling*, 1 B. and B. 447; *Jackson v. Davison*, 4 B. and A. 691. But all those decisions related to new securities given as a consideration for signing the composition-deed or certificate, and proceeded on the ground that the advantage gained by the particular creditor was a fraud upon the others, and they do not appear applicable to securities existing before the negotiation for a composition. See *Thomas v. Courtenay*, 1 B. and A. 1."

## II.—GORING v. EDMONDS.

June 23, 1829.—E. 6 Bing. 94. Eng. Com. Law Reps., vol. 19.

ASSUMPSIT on the guaranty at the foot of the following agreement, which had been entered into by the defendant's son :—

"Agreement between Charles Goring, Esquire, and Thomas Edmonds, Jun.—I, Thomas Edmonds, at Steyning, agree to purchase so many oak trees as are marked, and shall be marked by us at Olbourne and East Grinstead, at the price of £10 per load, girth measure of fifty feet by the load. But should Mr. Markwich, when he measures the same, consider the sum of £10 per load not a sufficient price, he is to fix such price as he considers it to be worth. And I hereby agree to pay the price he shall fix upon, though it shall exceed £10 per load. And further, I agree not to remove the timber or bark without the consent in writing of Charles Goring, Esq., from off the said estates where the said timber shall be cut; and whatever \*securities I may give to Charles Goring, Esq., to induce him to consent to the timber [106] and bark being taken away, shall be taken up and discharged, half at Michaelmas, and the other half at Christmas next at farthest.

"THOMAS EDMONDS.

"In the event of my son Thomas Edmonds, Jun., not paying Charles Goring, Esq., I hold myself liable, and hereby engage to fulfil the said payments according to the above conditions.

"April 20, 1825.

THOMAS EDMONDS."

At the trial before Tindal, C. J., Middlesex sittings after Easter Term, it appeared that the defendant and his son having signed the foregoing instrument in April, 1825, the timber was all removed by Edmonds the younger, without any farther security being required. On the 19th December, 1825, two bills for £200 each, drawn by Edmonds the younger on one Alexander, and accepted by him, were paid into the plaintiff's bankers. These bills were duly honoured in March, 1826. There remained then due to the plaintiff, in respect of the timber, £486, 16s. From that time to the close of 1827, repeated applications were

made in vain to Edmonds the younger for payment. On the 1st of October, 1827, Edmonds the younger gave the plaintiffs a bill for £200, drawn by him on one Williams, which became due, and was dishonoured early in December, 1827. The plaintiff, however, never returned it, nor gave any notice of dishonour. About that time Edmonds the younger became bankrupt, and the plaintiff, through his attorney, applied for the first time to the defendant upon his guaranty, for payment of the £486, 16s. The defendant admitted his liability, but was not aware of the bill accepted by Williams.

On the part of the defendant it was contended, at the trial, that his liability was discharged by the plaintiff having taken bills from the son, and by his not having earlier communicated to the defendant the state of the account. *Payne v. Ives*, 3 D. and R. 664, was relied on.

[\*107] For the plaintiff it was insisted, that as there was a fixed \*day for payment, there had been no unreasonable delay in applying to the defendant. The chief-justice told the jury, that in order to discharge the defendant time must have been given, under such circumstances, that the plaintiff must have lost his remedy against the original debtor; and he observed on the admission of liability made by the defendant himself.

A verdict having been found for the plaintiff, damages £486, 16s.,

*Russell Serjt.*, moved to set it aside, on the ground of a misdirection, or to reduce the damages by £200.

The defendant was discharged by the plaintiff's dealings with the principal debtor. In *Peel v. Tatlock*, 1 B. and P. 41, it was considered by the court, that delay in calling upon a guarantee does not exonerate him, unless it can be shown or presumed that he is a loser thereby. But here the defendant might well be presumed to be a loser. Two years, during which the principal creditor was in good credit, the guarantee was never called on. He was applied to only when the failure of his principal deprived him of any chance of being reimbursed.

In *Payne v. Ives* and others, 3 D. and R. 664, the defendants gave the following guarantee:—"We undertake to indorse any bill or bills Mr. John Stubbs may give to Messrs. Payne and Co., in part payment of an order for lace which is now being executed for him. Messrs Payne and Co. to allow 5 per cent., on the amount of the said bills for the said guarantee." Stubbs paid the plaintiffs part of the amount in money, viz., £500, and gave them a bill for the remainder, viz., £337, at eighteen months, and the plaintiffs kept the bill for seventeen months and ten days, and then finding that Stubbs was insolvent, applied for the first time to the defendants, Ives and Co., for their indorsement. And it was held, that the plaintiffs were concluded by their laches, and that the defendants were not liable on their guarantee. *Abbott, C. J.*, said, "the general rule of law upon such subjects is clear, namely, that the demand must be made within a reasonable and convenient time. But for the plaintiffs to forbear their demand for seventeen months out of [\*108] eighteen, was neither reasonable nor convenient. Besides, \*here the plaintiffs lie by till they learn that Stubbs is insolvent, and until they discover that the indorsement is the only means by which they

can secure their debt; and, but for that discovery, they probably never would have applied at all. That, I think, they were not entitled to do under the agreement, and, consequently, they ought not to have recovered in this action." And Bayley, J., said, "The option given to the plaintiffs ought to have been made in a reasonable time, and, at any rate, before that event occurred, of which, if the defendants had known, they never would have given the guarantee." Holroyd, J., said, "The plaintiffs did not exercise their option till within a few days of the bill becoming due, and till they knew of the insolvency of the acceptor. I think they were not justified in such delay, and that is the only question in the cause. With respect to bonds, it is laid down by Lord Chief-Baron Comyns, that where a condition is to do a transitory thing, without limiting the time, it ought to be done immediately, that is, in a convenient time."

As to the £200 bill, by keeping it and giving no notice, it is quite clear that the plaintiff made it his own. The death, bankruptcy, or known insolvency, *Russel v. Langstaffe*, Dougl. 514; *Esdale v. Sowerby*, 11 East, 114, of the drawer, or his being in prison, *Haynes v. Birks*, 3 Bos. and Pul. 601, constitute no excuses either at law or in equity for the neglect to give due notice of non-acceptance or non-payment; and the reason is, that many means may remain of obtaining payment by the aid of friends or otherwise, of which it is reasonable that the drawer and indorsers should have the opportunity of availing themselves; and it is not competent to the holders to show that the delay in giving notice has not in fact been prejudicial.

Besides, the taking the bill was a discharge, at least *pro tanto*, as giving time, for an hour discharges the surety. Defendant's acknowledgment could not affect his rights, when made in ignorance of the circumstances. In the case of a bill of exchange, a promise to pay, by an indorser or other party, if made without a knowledge of the laches of the holder in respect of such a bill, will not be binding. *Blessard v. Hirst and Another*, Burr. 2670; *Goodall and Others v. Dolley*, 1 T. R. 712.

\*In this last case, a bill drawn in favour of defendant, payable 11th January, 1787, was presented for acceptance by the plaintiffs on the 8th November, 1786, when acceptance was refused; they gave no notice to the defendant till the 6th January, 1787, and then they did not say when the bill was presented. The defendant proposed paying by instalments, which offer was rejected by the plaintiffs, and they brought the action. Heath, J., ruled that the defendant was discharged for want of notice, and that his offer to pay being made in ignorance of the circumstances was not binding: the jury found a verdict for the defendant, and upon cause shown against a rule for a new trial, the court held the direction and the verdict right. [\*109]

TINDAL, C. J.—This is not a case for a new trial. There are two points on which it is suggested the jury have been misdirected. The first, that mere laches in the party secured will operate as a discharge to the surety: but no case goes to that extent, and there are many which establish the reverse. I am far from saying there may not be an extreme

case of laches amounting to fraud, and fraud would be a defence to the action, but not mere negligence. In *Trent Navigation Company v. Harley*, 10 East, 34, the obligees in a bond conditioned for the principal obligor to account for and pay over tolls, did not examine his accounts for eight or nine years, and did not call for payment so soon as they might have done, but they obtained a verdict in their favour; and on a motion for a new trial, Lord Ellenborough said, "The only question is, Whether the laches of the obligees in not calling on the principal so soon as they might have done, be an estoppel at law against the sureties? I know of no such estoppel at law, whatever remedy there may be in equity." The case of *Payne v. Ives* was on an executory promise to indorse in future any bills Stubbs might give in payment for lace, and no application was made to the defendants till nearly eighteen months after the bill was given. That might so alter the state of things as to be too late in an executory contract. But that will not govern the case of a guarantee. The second objection is, that the mere giving of time on [\*110] the bill would discharge the defendant; but \*in *English v. Darte*, 2 B. and P. 61, it was held, that merely giving time, without an engagement to suspend the usual remedies, will not discharge the surety. The point here was left to the jury upon the material question, whether time had been given under such circumstances; and it appeared to me that they found correctly.

*PARK, J.*—I concur with my Lord Chief-Justice. In the *London Assurance Company v. Buckle*, 4 B. Moore, 153, which was an action of debt on a bond for £2000 duly executed by an insurance broker as the principal obligor, and two sureties with a certain condition, it was held, that the sureties were not discharged by the laches of the obligees in suffering the credit of the broker to run on so long beyond the six months stipulated by the bond. I fully concur in the doctrine there laid down, and that case is stronger than the present.

*BURROUGH, J.*—The direction to the jury cannot be impeached.

*GASELEE, J.*—I think a surety has a duty upon him to go and inquire as to the state of the transaction. In *Orme v. Young*, 1 Holt, 85, there was delay in giving notice, and yet the surety was holden not to be discharged. Rule refused.

[\*111] \*WHEN A CO-SURETY OBTAINS FROM THE PRINCIPAL DEBTOR A SECURITY, HE IS NOT ENTITLED TO APPLY THE WHOLE PROCEEDS TO HIS OWN RELIEF, BUT IS BOUND TO COMMUNICATE THE SECURITY TO THE OTHER CO-SURETIES; BUT IF HE IS A CREDITOR OF THE PRINCIPAL DEBTOR IN OTHER OBLIGATIONS, HE IS ENTITLED TO APPLY THE SECURITY FIRST IN SATISFACTION OF THESE OBLIGATIONS.

# I.—CAMPBELL v. CAMPBELL.

July 18, 1775.—S. Morr. 2132. 2 Hailes, 641.

JOHN CAMPBELL of Clochombie, now deceased, and James Campbell

of Balinaby, were bound with Major Donald Campbell, of Castlesween, in a bond to the Bank of Scotland, for £650 sterling.

Mr. Campbell of Duntroon, and David Campbell now of Clochombie, became bound by the major in another bond of £700 sterling, to Mr. Lockhart.

The major being called upon to pay these and other debts, to the amount altogether of £4000 sterling, Colonel Donald Campbell, in order to relieve him, paid the debts to the bank, and to Mr. Lockhart, and took assignments to them, and likewise advanced the remainder of the £4000; and he at the same time got from the major an heritable security upon his estate. And some time afterward, the colonel having received payment of his whole sums advanced, from Clochombie, he assigned in his favour the debts and securities, in the same way as they stood in his own person. And Clochombie now claiming from Duntroon one half of the £700 bond, in which they were joint cautioners for Major Campbell, it was

*Pleaded on behalf of Duntroon*;—That he was not obliged to make payment of any part of the debt, without being assigned to a proportional part of the heritable security: That co-cautioners are considered in the eye of law as so many *socii* or co-partners, so that, whatever loss may in the issue accrue from the joint obligation, it must fall equally upon all; in the same way as in a society, whatever loss there is at the winding \*up of the co-partnery concern, it divides [\*112] equally among all the co-partners.

*Answered*; That Clochombie was willing to assign the debt to the extent of the half which Duntroon was to pay, if he desired such an assignation, in order to enable him to operate his relief against the principal debtor Major Campbell; but that he was not bound to convey the heritable security, which stood in his person for the whole of the above debts, at least he was not bound to convey it to his own prejudice, or so as to enable any other person to compete with him; but he had no objection to convey it, reserving a preference to himself for the whole sums due to him; and he apprehended he could not be obliged to assign in any others terms, being entitled to keep up the security for his own behoof, till the last shilling of the sums due to him was paid; for that the principle contended for, of an alleged co-partnery or society among cautioners, has no solid or legal foundation in the case of a security obtained by one of the cautioners for his own relief.

Lord KAIMES.—I do not understand any principle of law which makes a society of co-cautioners. It is a rule in equity that a creditor must deal with candor among cautioners, so as to assign, that each may pay a proportion, and be proportionally relieved. If a cautioner has got a security, upon the same principle, he is bound to assign to co-cautioners, that they may be relieved. But equity goes no farther, for no man is bound to sacrifice his own interest; thus one being a catholic creditor is not bound to assign a secondary security. If such is the case of the original creditor, he may assign to a stranger; and if to a stranger, why not to a cautioner?

Lord HAILES.—In the Dictionary, where the case of Brodie is quoted JULY, 1858.—6

from Lord Stair, it is said that co-cautioners are as partners in a society. It has been observed, for Clochombie, that this is no more than an argument or an illustration used by one of the parties. The better answer would have been, that there is no such expression in the argument as recited by Lord Stair; so that this is at best an illustration by the [\*113] author \*of the Dictionary. I do not understand the nature of the co-partnery for which Duntroon pleads. It is a *commune negotium*, of which he may take the benefit or not, as he pleases; from which he may at his pleasure draw benefit without incurring loss; and of which, by splitting it, he may take a part and leave a part. If Clochombie does not communicate to Duntroon, Duntroon will be just as he was, while the debt remained in Colonel Campbell. If Clochombie does communicate, he himself may be a loser. All this happening in a society is beyond any notion that I have of a society.

Lord COALSTON.—I think that the interlocutor must be varied in part. In determining this cause, it is not necessary to determine the general point of law, how far a cautioner, acquiring a security, is bound to communicate it. But that it is not the question here; the question is concerning a separate security obtained by a creditor, and assigned to a distressed cautioner. I think that the cautioner is bound to communicate. Colonel Campbell is creditor in three different debts. This cause must be determined as if there had been three separate securities. Colonel Campbell was entitled to retain the whole security till all was paid. Clochombie is entitled to retain until payment of the debt in which Balnair is bound, and until payment of the debt in which he himself is bound. The debt in which Clochombie and Duntroon are bound, is the only debt to be judged of. When a creditor has an heritable security and a cautioner, on the cautioner's paying he must assign the heritable security. Upon payment of their respective shares, the cautioners are entitled to have the debt made over to them. A private transaction between a creditor and one cautioner cannot hurt the other cautioner. Clochombie is obliged to assign a proportional part of the security, but under this quality, that he himself be not hurt as to the other two debts.

Lord MONBODDO.—Both parties have properly resorted to the Roman law. It was said that there was a society among cautioners. I see nothing of that in the Roman law, nor in ours. Parties may be bound [\*114] as cautioners without knowing \*one another. The relief given is founded on the *actio negotiorum gestorum* by the Roman law. Our law has gone further, and has given the same action, not against the debtor only, but also against the co-cautioners. Hence a cautioner paying the whole debt has an action against the co-cautioner *actione negotiorum gestorum directa*. He is also obliged, *actione contraria*, to communicate the benefit. Suppose that Mr. Lockhart had not been satisfied with his security, and had taken an heritable bond, he would have been obliged to assign the heritable security on receiving payment.

The same is the case as to Colonel Campbell, and would have been although the debt had gone through an hundred hands. There are other debts to the extent of £3300 sterling, with additional security: what difference does that make? The co-cautioner was entitled to have

demand an assignation to the £700 on payment. And if this was competent to Clochombie, it must be competent to Duntroon.

LORD COVINGTON.—Of the opinion last given. The principle of the interlocutor is just among creditors not connected, but there is a difference as to co-cautioners. There is a *bona fides*, which requires equality. They who are bound in the £700 are entitled to a proportional share of the security. All are co-principals with regard to the creditor. The counsel for Clochombie said that it was hard to establish a connexion between co-cautioners, who know nothing of each other. I see no hardship in that. The Roman law was full of subtleties on this point. There was a *verborum obligatio*, and certain words were required for constituting it. If the *correi debendi* acceded at different times, it was understood that there were different debts. This was afterwards altered on principles of justice. I think that cautioners are *correi debendi*, and bound in relief to one another. If this were not the case, injustice might be introduced. Here the co-cautioners were originally bound equally. The intervention of Colonel Campbell makes no difference when Colonel Campbell assigns to Clochombie: How can Clochombie divest himself of this cautionary obligation?

LORD PRESIDENT.—Lord Coalston's proposal seems to have \*much equity in it. The other opinions go on this principle, [\*115] that Colonel Campbell was entitled to the whole benefit of his security, and not obliged to assign a proportional part. If so, How can the person who steps into his shoes be in a worse situation?

LORD ALEMORE.—Equality is the thing in my view. How would the case have stood as to Colonel Campbell? Upon his heritable security he was safe, as far as the estate went. As for the residue, he must have recurred against the cautioners. What more had the cautioners to say? In the case that has happened, Clochombie must assign after having secured himself as to the other debts.

LORD KAIMES.—If Clochombie once gets payment of the debt, in which he alone is bound, he must communicate *quoad ultra*.

LORD GARDENSTON.—Colonel Campbell was not bound to assign in part, nor was any stranger. I see no difference as to the case of a cautioner.

LORD PRESIDENT.—It comes to this, that a co-cautioner should not do anything by which a co-cautioner may be hurt.

The lords found, "that Clochombie is entitled to apply said heritable security for relief and payment of the first and last of these debts, (viz., the debt to the bank, and balance advanced by Colonel Campbell,) and in so far is not bound to communicate it, or any part of it, to the petitioner. But as to the debt originally due to Mr. Lockhart, find, he must communicate said heritable security to the petitioner, to the effect that any loss on that debt may be borne by him and the petitioner proportionally, but not to compete with the respondent as to the other two debts."

[\*116]

## \*II.—MILLIGAN v. GLEN.

May 20, 1802.—S. Mor. 2140.

GLEN AND MILLIGAN were co-cautioners for Mounceie in a bond of credit. Glen obtained for himself an heritable security in relief.

Mounceie became insolvent, and the heritable property over which Glen had security, was sold by trustees appointed by Mounceie. The proceeds were received by Glen, who paid to the bank the half of the sum due by Mounceie upon his cash account. Milligan, the other cautioner, having been forced by diligence to pay the balance, brought an action against Glen for relief of one-half of this balance.

*Pleaded for Glen*;—He had already paid one-half of the debt, and could be liable for no part of the other half.

*Answered*;—The sum paid by Glen did not come out of his own pocket, but out of the funds of the bankrupt; and although Glen had obtained an heritable security, *ex facie* to himself only, he was bound to communicate the benefit of it to his co-cautioner.

The court having judged of the cause on informations, decerned against the defender in terms of the libel; thereby deciding, in conformity with opinions delivered on the bench, that a cautioner obtaining a security in relief to himself, which has the effect of operating payment of the debt out of the funds of the principal debtor, is bound to communicate the benefit of that security to co-cautioners.

[\*117] \*WHERE CO-SURETIES ARE NOT BOUND FOR THE WHOLE DEBT, BUT EACH FOR A PARTICULAR SUM, A CO-SURETY WHO OBTAINS A SECURITY FROM THE PRINCIPAL DEBTOR IS NOT BOUND TO COMMUNICATE THE BENEFIT OF IT TO THE OTHER CO-SURETIES.

## LAWRIE v. STEWART.

June 6, 1823.—S. 2 S. 327.

MENZIES entered into a private contract with his creditors to pay a composition on his debts, in three instalments. For the last of these instalments, the pursuer, Lawrie, with Stewart and others, became cautioners in a bond to a trustee. Lawrie bound himself for £500, Stewart for £1000, and the other defenders for £300 each, “or such parts or portions of the said sums respectively, as shall be found necessary for paying the said last instalment of the said composition; and that according to the amount of the said sums subscribed by us respectively,” so as to enable the trustee to pay the last instalment, “or the deficiency that may remain thereof.” It was then declared, that each was to be liable only to the extent of the sum for which he bound himself, and no farther. By a transaction between the bankrupt and the defenders, they



were secured against any loss ; but Lawrie was obliged to pay the £500 which he had subscribed. He then brought an action against the defenders, to compel them to communicate to him a proportional part of the relief which they had obtained. They maintained, that they were not obliged to do so, because they were not joint cautioners.

The lord ordinary assoilzied them, in respect, “that the defenders were not *correi* with the pursuer ; but that each of the parties was bound to the amount of his own individual subscription, in the same manner as if the obligations had been granted by separate and distinct bonds.”

The court, on advising two petitions and answers, by a majority, adhered, but found no expenses due.

Lords HERMAND and GILLIES were of opinion, that the \*parties were engaged in a *commune negotium*, being cautioners for [\*118] the same person, the same debt, and to the same creditors ; and therefore, were truly joint cautioners, and, as such, bound to communicate the benefit of any separate relief. But the other three judges, LORDS PRESIDENT, SUCCOTH, and BALGRAY, agreed with the opinion of the lord ordinary.

WHERE A CREDITOR PROCEEDS FIRST AGAINST THE ESTATE OF AN INSOLVENT CO-SURETY, HE IS RANKED ON SUCH ESTATE FOR THE FULL AMOUNT OF THE WHOLE DEBT, AND THE CREDITORS OF SUCH CO-SURETY HAVE NO CLAIM OF RELIEF AGAINST THE OTHER CO-CURETIES, EXCEPT IN SO FAR AS THE AMOUNT OF DIVIDEND RECEIVED FROM THE ESTATE OF THE INSOLVENT CO-SURETY EXCEEDS THE SUM WHICH HE WOULD HAVE PAID IF HE HAD CONTINUED SOLVENT.

# CRANSTOUN v. M'DOWAL.

May 22, 1798.—S. Mor. 2552.

DR. JOHN M'FARLANE was joint obligant with James M'Dowal elder, and James M'Dowal younger, in bonds for £3630. The Doctor, however, was only cautioner for the others, who granted him a bond of relief.

James M'Dowal elder, and Archibald M'Dowal, were cautioners for Dr. M'Farlane, in a bond for £1000 to Dr. John Trotter.

Dr. M'Farlane and James M'Dowal younger, were cautioners for Archibald M'Dowal, as treasurer of Heriot's Hospital, and in a cash account which he held with the Royal Bank ; and Archibald M'Dowal having become bankrupt, his cautioners were made liable to the hospital for a balance of £757, 4s. 4d., and to the bank for a balance of £243, 19s. 5d.

Dr. M'Farlane, in 1788, died insolvent ; but he was never rendered bankrupt under any of the statutes. His son, Mr. John M'Farlane, having served heir to him *cum beneficio*, and expedite a confirmation as his executor, disposed of his whole heritable and moveable property,

[\*119] except an entailed estate \*which was not liable for his debts. These funds were insufficient to pay 10s. a pound of his debts.

Mr. M'Farlane brought a multiplepinding, in which he called both the proper creditors of his father, and those to whom he was bound as cautioner for the Messrs. M'Dowals, for the purpose of having the funds divided. The purchaser of the Doctor's heritable property consigned the price, and likewise brought a multiplepinding for the same object. These actions were conjoined, and the creditors of Dr. M'Farlane appointed Thomas Cranstoun, writer to the signet, their common agent and trustee; and in compliance with their request, and an order of court, Mr. John M'Farlane executed a trust-disposition in his favour, for behoof of the whole creditors.

James M'Dowal elder and younger were by this time dead. But although the fortune left by them was more than sufficient to pay their debts, many of their creditors, to whom Dr. M'Farlane had become cautioner, claimed on his estate for their whole debts, and, in consequence, drew dividends from it to the amount of £1441, 3s. 7d.

The debt due to Heriot's Hospital and the Royal Bank, for which James M'Dowal, junior, and Dr. M'Farlane, were joint cautioners for Archibald M'Dowal, were also ranked for their full amount on Dr. M'Farlane's funds. The hospital drew from them £358, 13s. 4d., and the bank £114, 2s.; but these sums fell short of one half of the debts due to these creditors.

Dr. Trotter was ranked as a proper creditor of Dr. M'Farlane for his bond of £1000, and bygone interest; and, after deducting the dividends which he drew, there remained due to him £1060, 1s. 5d.

By the decree, ranking the creditors of Dr. M'Farlane, the proper creditors of Archibald M'Dowal, and of James M'Dowal senior and junior, were ordained to assign their debts to Mr. Cranstoun, to the extent of the dividends for which they were ranked before drawing them.

Mr. Cranstoun afterwards brought an action against Miss James-Ann M'Dowal, the representative of James M'Dowal senior and junior, concluding, that she should relieve Dr. M'Farlane's estate, 1st, Of the bonds in which he became cautioner for their proper creditors; 2dly, Of one [\*120] half of the \*debts in which James M'Dowal, junior, and Dr. M'Farlane were jointly cautioners of Archibald M'Dowal. The summons further concluded for a settlement of accounts, and payment of what should be found due to Dr. M'Farlane's estate.

Miss M'Dowal, in defence, contended, That as she had a right to be relieved by Dr. M'Farlane of the bond to Dr. Trotter, in which James M'Dowal, senior, was cautioner, and also of a full half of the debts for which James M'Dowal, junior, and Dr. M'Farlane, were bound as cautioners for Archibald M'Dowal, she was entitled to set off these claims against the dividends which had been paid to her proper creditors from Dr. M'Farlane's funds.

The lord ordinary remitted the cause to Mr. Keith, accountant, who gave in a report containing two views.

The first view supposed Miss M'Dowal entitled to set off her claims of relief against the dividends drawn by her proper creditors from Dr.

M'Farlane's estate. It accordingly debited her with these dividends, being, £1441 15 7

But, on the other hand, she was credited with the following balances of Dr. M'Farlane's debts, for which she was liable as cautioner :

1. Dr. Trotter's debt, after deducting the dividends he had drawn from Dr. M'Farlane's estate, £1060 1 5
2. One half of the cautionary debt to Heriot's Hospital, considered as Dr. M'Farlane's proper debt, deducting the dividends drawn from his estate on the whole debt, 132 2 0<sup>9</sup>/<sub>12</sub>
3. One half of the cautionary debt to the Royal Bank, after making the like deduction, 42 10 4

£1234 13 9<sup>9</sup>/<sub>12</sub>

By which the balance due to the pursuer by the defender, was

£207 1 9<sup>3</sup>/<sub>12</sub>

\*Mr. Keith's second view proceeded on the supposition, 1st, [\*121] That Miss M'Dowal was not entitled to set off her claims of relief against the dividends drawn by her creditors from Dr. M'Farlane's estate; and 2dly, That as Heriot's Hospital and the Royal Bank had ranked for their full debts upon Dr. M'Farlane's estate, his creditor were entitled to draw back from Miss M'Dowal, as representing the other cautioner, one half of the dividends which had been paid to them. On these principles, the pursuer's claims against Miss M'Dowal stood thus:—

1. Amount of the dividends from Dr. M'Farlane's estate, drawn by the creditors of James M'Dowal elder and younger, £1441 15 7
2. One half of £358, 13s. 4d., drawn by Dr. M'Farlane's estate by Heriot's Hospital, 179 6 8
3. One half of £114, 2s., drawn by the Royal Bank, 57 1 0

Which made the sum due by Miss M'Dowal, £1678 3 3

In support of this last view, Mr. Cranstoun pleaded as to the first point;—It being the duty of every solvent person to pay his own debts, the defender ought to have paid those of James M'Dowal elder and younger, in which case they would not have ranked on the estate of Dr. M'Farlane. It is therefore, in consequence of a tortious neglect on her part, that her claim of compensation arises, and from this wrong she can be allowed to reap no benefit. According to her plea, she would obtain a preference on Dr. M'Farlane's funds, not only after his death and insolvency, but after his effects have been judicially set apart to be equally divided among all his creditors, a mode of obtaining a preference contrary to the spirit of our own law, and expressly reprobated by the civil law, l. 6, et 7, ff. Quæ in fraud. cred. fact. Voet de Compens. § 9. And the same debt, too, would rank twice on the same estate. Thus Dr. Trotter has already drawn a proportional dividend from Dr. M'Farlane's estate, so that were the defender allowed to set off her claim to be re-

[\*122] lieved of that debt, against the sums which Dr. M'Farlane's creditors have paid to account of her proper debts, it would follow that the debt to Dr. Trotter would be fully paid out of Dr. M'Farlane's funds, while his other creditors will not get one half of what is due to them.

Besides, a creditor having a principal debtor, and a cautioner bound to him, jointly and severally, is like a catholic creditor having two securities, both of which he may no doubt use in what order he pleases, in so far as his own interest is concerned, but not arbitrarily to the prejudice of others, *Erskine*, b. 2, tit. 12, § 66. Now, where the principal debtor is solvent, the only advantage which his creditor can derive from ranking on the estate of the cautioner, is to get more prompt payment of his debt, or part of it, than he might otherwise have done. The proper creditors of the cautioner have therefore a right to insist that they shall not be injured by the manner in which he has used his two securities, and that the rights of all parties shall be preserved the same as if he had followed the natural course, and drawn his payment from the principal debtor; and for this purpose, he is bound to assign his security to the proper creditors of the cautioner. Accordingly, in this case, the creditors of James M'Dowal, senior, are expressly ordained by the decree of ranking to assign their securities to the pursuer as trustee for Dr. M'Farlane's creditors, to the extent of the sums which they have drawn from the Doctor's estate. And these sums are not in law considered as payment of a debt or dividends from a debtor's estate, but as a price paid for the purchase of the creditor's right.—*Kaimes' Principles of Equity*, p. 85. Consequently, the pursuer, as standing precisely in the right of the cedents, is entitled to draw back from the defender the money paid to them, free from any claim of compensation which she might have had against Dr. M'Farlane had he been alive and solvent. Indeed, had it not been for the form of the bonds by which Dr. M'Farlane was bound as joint obligant, the defender's plea could not have occurred, as the benefit of discussion would have forced the creditors to have taken payment from the principal debtor. The form, however, of the cautionary obligation was merely for the accommodation of the creditors, and can make no difference on the right of relief competent to the cautioner.

[\*123] \*Second point;—With regard to the dividends drawn by the Royal Bank and Heriot's Hospital, the pursuer further contended That as Dr. M'Farlane and James M'Dowal, senior, were co-cautioners to these creditors for Archibald M'Dowal, the Doctor was liable as principal debtor only for one half of the balances due to them. Consequently, they ought in justice to have ranked only for one half of their debts on Dr. M'Farlane's estate, and claimed the other half from the defender. And that, as it was unjust that Dr. M'Farlane's creditors should be losers by their having ranked arbitrarily on the Doctor's funds for their whole debts, the pursuer was entitled to insist for relief from Miss M'Dowal of one half of the sums which they had drawn.—*House of Lords*, 11th June, 1794, *Creditors of Maxwell v. Heron*, Mor. 2130.

*Answered* as to the first point;—Dr. M'Farlane was not rendered

bankrupt under any of the statutes; and neither the deficiency in his funds, the trust-deed granted by his heir to the pursuer, nor the multiplepinding which has been raised, can entitle the Doctor's creditors to state any plea which would not have been competent to himself. And it is plain, that before the Doctor could have claimed relief of the debts which he might have paid for the defender, he must have relieved her of the obligations which her predecessors had undertaken for him. The defender had no control over her creditors. They were entitled to claim on Dr. M'Farlane's estate. Indeed, as they saw mutual claims of relief existing in the Doctor's life-time, it was but just in them to act in such a manner as to give them effect, in place of assisting the Doctor's other creditors to evade them. They have accordingly done so; and there is no principle of law which can prevent the defender from availing herself of the fair advantage which she has thereby obtained. It is indeed far from being uncommon, in the distribution of an insolvent person's effects, for one creditor to obtain a greater relief, or a broader preference, than his competitors, by the accidental operation of other claims upon the fund.—5th July, 1796, Trustees for Bertram, Gardner and Company v. White.

The pursuers having obtained assignments from the defender's creditors, does not in the least strengthen his case. The sole [\*124] ground on which they were obtained, was the right which Dr. M'Farlane's creditor's had to be relieved by the defender, and this right is exactly met by her right to be relieved by Dr. M'Farlane.

Second point;—In defence against the pursuer's claim to be relieved of one half of the dividends paid to the Royal Bank and Heriot's Hospital, the defender answered, That the case of Maxwell's Creditors, as decided in the house of lords, did not at all bear upon the present. It was no doubt there found, that a cautioner paying the whole debt, could only rank on the estate of a co-cautioner for one half of it. But here the original creditors ranked for their full debts on the estate of one of the co-cautioners, which they were clearly entitled, and indeed called upon to do, as they would have acted partially and unjustly had they done otherwise.—12th January, 1796, Hunter and Company v. Machutcheon. And, as in the present case, the dividends which these catholic creditors have drawn, have not fully paid even Dr. M'Farlane's half of the debt, no claim for relief of any part of them can lie against the defender.

The lord ordinary found, "That this question must be determined by the situation and circumstances of the parties, with respect to their mutual obligations for each other at the time of Dr. M'Farlane's death and bankruptcy, not by the accidental and very uncommon situation and circumstances in which the parties are now placed, in consequence of those creditors of the defenders, who held the Doctor bound in relief to them, claiming upon his funds, and drawing dividends therefrom before they made any demand upon the defender, who continued solvent; therefore the lord ordinary approved of the second view reported by Mr. Keith."

Miss M'Dowal having reclaimed against this judgment, the court, (24th January, 1798,) upon the first point "Found the petitioner James-

Ann M'Dowal, and her factor *loco tutoris*, bound to pay the respondent, (Mr. Cranstoun,) as trustee for the creditors of Dr. John M'Farlane, the dividends received out of that estate by the proper creditors of James [\*125] M'Dowal elder \*and younger; but (upon the second point) as-  
soilzied the petitioner, and her factor, from the claim for any part of the dividends received out of that estate, upon debts for which Dr. M'Farlane was jointly bound, in respect these dividends do not exceed the proportion of those debts for which the Doctor was liable.

A reclaiming petition for Mr. Cranstoun against this judgment, (27th February, 1798,) upon the second point, was refused without answers. But one for the defender, Miss M'Dowal, upon the other branch of the cause, was appointed to be answered. And, on advising this last mentioned petition, with the answers, it was

Observed on the bench, When the case was formerly before the court, it was taken upon the supposition, that the giving effect to the defender's claim of compensation would be to allow the debt to rank twice on the same estate. It appears, however, on further consideration, that there is no double ranking in the case, nor any injustice done; and that the defender's plea is grounded on the necessary operation of mutual claims of relief, and consequently of compensation or retention, which are entitled to their legal effects wherever they occur.

The lords, accordingly, with only one dissenting voice, "altered the interlocutor reclaimed against, and sustained the petitioner's defences to the extent of £1234, 13s. 9<sup>9</sup>/<sub>12</sub>d.

A reclaiming petition for Mr. Cranstoun was refused, (8th June, 1798,) without answers.

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[\*126] \*WHERE A CO-SURETY OBTAINS FROM THE PRINCIPAL DEBTOR A SECURITY, THE CREDITORS OF THE PRINCIPAL DEBTOR ARE NOT ENTITLED TO OBJECT TO THE BENEFIT OF THE SECURITY BEING COMMUNICATED TO THE OTHER CO-SURETIES.

### FISHER'S CREDITORS v. CAMPBELL.

Dec. 18, 1778.—S. Mor. 2134.

ANGUS FISHER, merchant in Inverary, Captain James Campbell, and others, in consequence of a credit allowed them by M'Adam and Co., bankers, to the amount of £600, upon a cash account in the name of Fisher, granted their bond, obliging themselves, conjunctly and severally, to repay the company the whole, or whatever part of this sum should be drawn out by Fisher. This credit was intended solely for behoof of Fisher, and Captain Campbell obtained from him an heritable security over his lands in relief of his engagement, on which he was infeft.

Fisher continued to operate on the cash account, until the whole cre-

dit was exhausted. Thereafter the company drew a bill on the obligants in the bond, for the principal and interest, which they accepted.

The company charged the acceptors with horning; and as Fisher, the principal debtor, was now insolvent, it became necessary for the remaining co-obligants to take measures for paying up the debt. Accordingly, two of them (Campbell of Knap, and Ochiltree of Lindsaig) paid each into the hands of Captain Campbell their respective proportions; which, with his own share, being put by him into the hands of his agent, the whole debt was by the agent paid up to the bank, and an assignation taken of the debt from the bank, and of the bond, bill, and diligence thereon, in favour of Captain Campbell.

Several adjudications had been led against Fisher's lands, subsequent to Captain Campbell's infetment. A ranking and sale was afterwards brought, in which Captain Campbell was ranked on his bond of relief for the principal sum of £600, or such part of the credit as had been drawn by Angus Fisher, in preference to the adjudging creditors, but with reservation to the creditors, of all objections to his claim until the division of the price. At that time, appearance was made for [\*127] the \*creditors of Knap and Lindsaig, both then bankrupt, who *insisted*, that they were entitled to the benefit of the heritable security, on which Captain Campbell stood ranked, to the extent of the sums which Knap and Lindsaig had respectively advanced towards payment of the debt to M<sup>r</sup> Adam and Co. No objection was made on the part of Captain Campbell; but the postponed creditors of Fisher opposed this claim, and *contended*, that the co-obligants had no right to a communication of the security. In support of this objection,

*Pleaded for Fisher's Creditors*;—Captain Campbell obtained the infetment of relief over Fisher's subjects solely for his own use. The other co-obligants rested on the personal security of Fisher; and Campbell was under no obligation to communicate to them his heritable security. There is no evidence, that, in paying the bank debt, the co-obligants put their money into Campbell's hands, under any concert or stipulation of that kind. Though the money of the two other co-obligants came through his hands, the debt must be considered as paid up by all the three.

The case is the same, as if their co-obligants had paid in separately their shares of the debt. Each of them continues to have that security for his relief which he originally had, and no other. Knap and Lindsaig remain mere personal creditors of the common debtor in relief. Campbell is entitled to the benefit of his heritable right over the subjects to relieve and secure himself, and, therefore, may avail himself of it, to operate payment, out of them, of what he contributed toward payment of the debt to the bank. But, to this extent alone can his security be of any avail, even to himself. The adjudging creditors of Fisher have, therefore, an interest to object to the co-obligants of Campbell getting the benefit of this heritable security for the shares of the debt paid by them. If the objection is good, the subjects will only be burdened with an heritable security to the extent of Campbell's share of the debt to the bank; and the whole benefit arising from the other co-

obligants not obtaining a preference as to their shares upon the heritable security, will accrue to the postponed creditors of Fisher, and not to Captain Campbell.

[\*128] *\*Pleaded for the Creditors of the co-obligants ;—*It might have been more beneficial to Fisher's creditors, that every obligant had paid his own share, and only got an assignment to a corresponding part of the debt ; for neither Fisher, nor his creditors, had any title to restrain the company from taking the payment of the whole debt from any one co-obligant, and assigning him to the whole. The transaction, therefore, betwixt Captain Campbell and the company, must have its full effect, being lawful and permissible to both parties ; and, by that transaction, the whole debt became heritably secured, and preferable on the estate of Fisher. Consequently, the postponed creditors of Fisher can never have a title to anything more than the reversion of the subjects, after the payment of this heritable debt to those who shall be found to have right to it. And the question, whether the co-obligants are entitled to a communication of the security, is entirely *jus tertii* to these creditors.

But, at any rate, the co-obligants would be entitled to insist for a communication of this security, even were Captain Campbell now opposing it. It is evident on the face of the transaction, that it was understood betwixt Captain Campbell and the co-obligants, at the time they put the shares of the debt into his hands, that there should be a communication of the heritable security to them. On this account, Captain Campbell took the assignation from the bank of the whole debt in his own name. Had he been looking only to relief for himself, he would have taken the assignation in his name, to the extent only of his share of the debt.

If Captain Campbell had paid up the whole of this debt with his own money, he might have insisted against any of the co-obligants for payment of their share ; but they, upon such payment, would have been entitled to an assignment of the separate heritable security in his person for their relief, to the extent of what they paid. It makes no difference, that, in the present case, the money was paid up by the co-obligants to Campbell, before he had made payment to the bank. The transaction is, in substance, the same.

[\*129] The court "found, That, after Captain Campbell himself is *\*secured*, there remains a *residuary security* to his co-cautioners, Knap and Lindsaig, on his infetment in the lands of Auchendryan, and therefore repel the objection to the decret of ranking ; and decern."

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A CO-SURETY WHO HAS PAID THE FULL AMOUNT OF THE DEBT OF THE PRINCIPAL DEBTOR, IS NOT ENTITLED TO RANK ON THE ESTATE OF AN INSOLVENT CO-SURETY FOR THE WHOLE DEBT TO THE EFFECT OF ENABLING HIM TO DRAW THE SUM WHICH THE INSOLVENT CO-SURETY



WOULD HAVE PAID, IF HE HAD CONTINUED SOLVENT, BUT HE IS ENTITLED TO RANK FOR THAT SUM ONLY.

# MAXWELL'S CREDITORS v. HERON'S TRUSTEES.

Feb. 8, 1792.—S. Morr. 2136. House of Lords, June 11, 1794.—3 Paton, 350.

SIR ROBERT MAXWELL of Orchardtown, Mr. Heron of Heron, and Mr. Maxwell of Cargen, were jointly bound for large sums of money. But Mr. Maxwell was truly the debtor, the other two having interposed as cautioners for him.

Mr. Maxwell became insolvent, and soon after Sir Robert Maxwell conveyed his lands to a trustee for the benefit of his creditors. Upon a sale, a very great deficiency appeared.

In the meanwhile, Mr. Heron having been obliged to pay the whole debts, obtained an assignment in the name of Sir William Forbes and Company, as his trustees. In virtue thereof he claimed to be ranked on the proceeds of Sir Robert Maxwell's lands, for the whole sums paid by him, to the effect of his recovering a full moiety of these sums. This was opposed by the other creditors of Sir Robert Maxwell, who

*Pleaded* ;—In a question with the creditor, every co-obligant is debtor to the full amount of the debt. And therefore the creditor is at liberty to attach their respective estates to that extent. Care only is to be taken, that he shall not on the whole receive more than is truly due to him.

But in a question between the co-obligants themselves, each of them is debtor only in his due proportion of the debt; and this proportion cannot be increased, directly or indirectly, by \*any operation of the creditor, or of the co-obligants; Creditors of M'Ghie v. Tait, 18th [130] November 1785, *voce solidum et pro rata*.

In some cases, it is true, a creditor may be ranked for more than is due to him at the time. Thus a creditor, after a sequestration, might, by the Bankrupt statute of 1783, be ranked for the whole sums due at the date of the sequestration, although he had afterwards recovered a part from collateral securities; but that could only be done where the bankrupt might have been sued for the whole; a proceeding inadmissible with regard to a co-cautioner. And in no instance could the claim be increased after the sequestration, which, however, would happen if one of two co-cautioners, who, during the solvency of the other, could only insist for a proportional relief, were to be permitted, in consequence of a bankruptcy, to demand payment of the whole.

A cautioner, after the bankruptcy of his co-obligant, cannot enlarge his claim of relief, more than an ordinary creditor can enlarge his claim of debt. And were it allowed to all the creditors, the only consequence would be a nominal increase of the debts, while the fund of division remained the same. Nor could the assignment from the creditor put the cautioner in a different situation: this being only done to facilitate the claim of relief, so far as it is authorized by law.

Neither can the particular form in which the cautioners interposed their security, by granting of joint bonds, affect the present question.

The creditor was thus authorized immediately to attach the estates of each *correus* for the whole sums due to him ; but the interests of third parties were not thereby in the smallest degree encroached upon ; and, on recovering his payment out of any particular estate, the law would imply an assignment to the creditors at large, to the effect of their obtaining from the funds of the other debtors a corresponding relief.

*Answered* ;—A creditor in a joint bond may attach and be ranked on the effects of every one of the *correi*, to the effect of recovering what is due to him. This is not, and cannot be disputed. The next object of [\*131] the law, after the creditor has thus \*received payment, is to divide the loss equally among the different co-obligants. And for this purpose, the creditor is bound to do everything that is in his power, although third parties may suffer a consequential loss.

If the effects of the co-obligants, all of them being insolvent, were to be distributed at the same time, the creditor ought certainly to rank on the different estates, so as to draw from each a rateable proportion of the debt. And thus, it is evident, that in the present case, the creditors in the joint bonds must have been ranked on Sir Robert Maxwell's estate for the whole debt, this being necessary for equalizing the loss.

Again, supposing that one of the co-obligants is bankrupt, and the other in good credit, if it were convenient for the creditor to delay his claim till the proceeds of the bankrupt estate come to be divided, the same thing ought to be done. And thus, as in the former case, the obligations of the parties, agreeably to their true meaning, would have a like effect as to all. But surely, although the creditor may find it necessary to ask his money sooner, that circumstance cannot, in the eye of justice, be considered to vary the rights of the parties.

And it is of no consequence, that if all the co-obligants had continued solvent, one of them, having paid the debt, could only sue his co-cautioner for one half. After a bankruptcy, the question is not to what extent the cautioner shall be ranked ; but what he is to draw. And if the creditor, by ranking on the estate of the bankrupt cautioner for the whole debt could have placed the solvent cautioner in the same situation, as if both had been alike able to fulfil their engagements, it is just that in virtue of the assignment from him, the solvent cautioner, after paying the debt, should be allowed to rank as he might have done.

The court were unanimously of opinion, That in the circumstances of this case, where before any trust-right had been executed by the insolvent cautioner, and where he that continued in good circumstances, had obtained an assignment from the creditor, the ranking ought to go on in the same manner as if no payment had been made.

\*The lords found, "That the trustee for the creditors of Sir [\*132] Robert Maxwell was bound to rank Patrick Heron, and Sir William Forbes and Company, as trustees for him, upon Sir Robert Maxwell's funds for the whole sums due on those debts, in which Mr. Heron and Sir Robert Maxwell were jointly bound along with Mr. Maxwell of Cargen ; but under this condition, that in consequence of their being so ranked, they shall not draw more than one half of the said debts."

A reclaiming petition for the creditors of Sir Robert Maxwell was refused, without answers, (on 23d February 1792.)

The case having been appealed, it was ordered and adjudged, "That the interlocutor of 8th February, 1792, complained of, be, and the same is, hereby affirmed, with the following variations, viz., after the word (for) insert (half,) and after (the) leave out (whole,) and after (Cargen) leave out to the end of the interlocutor, and insert, (each of them having been indebted, as principal, for a moiety thereof, and as security for the other moiety :) And it is further ordered and adjudged, That the interlocutor of 23d February, 1792, also complained of in said appeal, in so far as repugnant to said interlocutor, varied as aforesaid, be, and the same is, hereby reversed."

## PRINCIPAL AND AGENT.

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AGENCY MAY BE INFERRED FROM CIRCUMSTANCES AS WELL AS CONSTITUTED BY EXPRESS AUTHORITY, AND UNAUTHORIZED ACTS OF AGENCY ACQUIESCED IN ARE BINDING ON THE PRINCIPAL.

### PICKERING v. BUSK.

Jan. 27, 1812.—E. 15 East, 37.

TROVER for hemp. At the trial before Lord Ellenborough, C. J., at the sittings after Trinity Term in London, it appeared that Swallow, a broker in London, engaged in the hemp trade, had purchased for the plaintiff, a merchant at Hull, a parcel of hemp, then lying at Symonds' wharf in Southwark. The hemp was delivered to Swallow at the desire of the plaintiff, by a transfer in the books of the wharfinger from the name of the seller to that of Swallow. Shortly afterwards Swallow purchased for the plaintiff another parcel of hemp, lying at Brown's quay, Wapping, which latter parcel was transferred into the names of Pickering, (the plaintiff,) or Swallow. Both these parcels of hemp were duly paid for by the plaintiff. Swallow, however, whilst the hemp remained thus in his name, having contracted with Hayward and Co., as the broker of Blackburn and Co., for the sale of hemp, and having none of his own to deliver, transferred into the names of Hayward and Co. the above [\*134] parcels in satisfaction of that contract, for which \*they paid him the value. Hayward and Co. shortly after became bankrupts; and the plaintiff, discovering these circumstances, demanded the hemp of the defendants, their assignees, and upon their refusal to deliver it the present action was brought. His lordship was of opinion upon this evidence, that the transfer of the hemp, by direction of the plaintiff, into Swallow's name, authorized him to deal with it as owner, with respect to third persons; and that the plaintiff, who had thus enabled him to assume the appearance of ownership to the world, must abide the consequence of his own act. A verdict was thereupon found for the defendants, with liberty to the plaintiff to move to set it aside.

The Attorney-General in the last term accordingly moved for a new trial, on the ground that the principal in this case, by authorizing the transfer to be made into the name of his broker, had done no more than was usual and notorious in the course of that business, and therefore gave no authority to the broker, his agent, to transfer the property without his direction. Where by the ordinary course of trade the possession of goods is left with an agent, he cannot dispose of it as his own, but the purchaser must look to his authority. Such is the case of a factor, who by the usage of trade has authority to sell, but not to pledge. Therefore though he, like the broker in this case, be the apparent owner, yet his pledge will not bind the principal. As in *M'Combie v. Davis*, 6 East, 538, and 7 East, 5, where an assignment of tobacco in the king's warehouse had been taken by way of pledge from the broker who had purchased it there in his own name for his principal, it was held that the pawnee could not retain it against the principal.

The court now distinguished between that case, which was the case of a pledge, and beyond the scope of a broker's general authority; and this, which was the case of a sale and within his general authority; but they granted a rule to show cause, as the point was of general consequence.

*Garrow*, *Topping* and *Taddy*, now showed cause, and \*observed, that *Hayward and Co.*, who purchased the hemp of *Swallow*. [\*135] low, had no means of discovering that the hemp was not the property of the person in whose name it stood, and who took upon him to deal with it as his own. And it would be unjust that, because the broker has turned out to be an unfaithful steward of his employer, the innocent purchasers should suffer rather than the plaintiff, by whose act in suffering the goods to be entered in the broker's name, the latter was enabled to practise the delusion. If the plaintiff had meant to retain his dominion over the property, he should have taken the transfer in his own name instead of the broker's. *M'Combie v. Davis*, 6 East, 538, was the case of a pledge, and only decides that a broker cannot pledge the goods of his principal; which doctrine was before laid down in *Paterson v. Tash*, 2 Str. 1178, and *vi. Daubigny v. Duval*, 5 Term Rep. 604, in the case of a factor. But here *Swallow* made an absolute sale, which he had an apparent authority to do; and according to *Parker v. Patrick*, 5 Term Rep. 175, the owner, who has enabled another person to deal with the goods as his own, must abide the consequence if any loss occur by third persons dealing with such apparent owner. [BAYLEY, J.—That doctrine in its full extent would give the pawnee in all cases a better title than the original proprietor.]

The Attorney-General, *Park* and *Abbott*, contra.—The question is, Whether the property in the hemp passed by the sale and delivery of *Swallow*? The cases of *Paterson v. Tash* and *M'Combie v. Davis*, establish the principle, that if an agent go beyond his authority in disposing of the goods of another, that other is not bound by such an excess of authority; on that ground only has it been held, that a factor cannot pledge, because his principal has given him no authority to pledge; but he may sell, because his principal entrusts him with an authority to sell.

JULY, 1858.—7

How then can a broker, who has no authority either to sell or pledge, bind his principal by a sale? [Lord ELLENBOROUGH, C. J.—If Swallow had not the hemp for the purpose of sale, for what purpose had he it?] For the purpose of safe custody, and for the convenience of the owner.

[\*136] The world had no right to conclude from the circumstance of \*the goods being in his name, that therefore he had the power of disposing of them. The argument, that the property in goods should follow the possession; might have weight, if the question were whether the law should be altered in this respect; but that such is not the rule of law is clear from the excepted case of a sale in market overt, by which alone the property of another is bound. If a person entrust his watch to a watchmaker for the purpose of repairing it, and he sell it, the owner is not bound by such sale, because he had given no authority to sell. [Lord ELLENBOROUGH, C. J.—In that case the watchmaker is not exhibited to the world as the owner, and the world does not credit him as such merely by reason of his possession of the property. But here Swallow was a common agent for the sale of property of this description.] Unless Swallow had the power of sale expressly given him, no such power can be implied from the mere fact of the goods being entered in his name at the wharfs. It does not follow that he who permits the possession of property by another, therefore gives him an authority to dispose of it, though that other may deal in goods of the same kind. If one entrusts a chest of tea, for the purpose of safe custody, to a grocer who deals in such commodity, and whom the world therefore might suppose to have the property in the chest, and he sell it—the chest remaining unbroken,—without doubt the owner may recover it from the vendee; for the grocer was only entrusted with the custody, and in cases of this kind the rule of *caveat emptor* applies. So where goods are consigned to a merchant from abroad, the consignee cannot go beyond his authority in disposing of them; and yet he may have the full possession of them either by delivery of the goods themselves or of the bills of lading, *Newson v. Thomson*, 6 East, 17, and may thereby impose on the world. The principle of all which cases is this, that a person who is entrusted with the goods of another can do no more in respect of those goods than what the other has authorized him to do. Whether Swallow had power to sell is a fact, and not an inference of law arising out of the apparent possession; but no such fact was proved or found in this case. The only distinction between this and the case of a factor is, that the factor [\*137] has some authority, that is, \*to sell; but here Swallow had none. In *Wilkinson v. King*, 2 Campb. N. P. Cas. 335, which was trover for lead, it appeared that the plaintiff had sent the lead to a wharfinger who was accustomed to sell lead; and he sold it to the defendant, who bought it *bona fide*; yet it was held that the plaintiff was entitled to recover. [Lord ELLENBOROUGH, C. J.—That was the case of a wharfinger, whose proper business it was not to sell; and to whom the goods were sent for the mere purpose of custody.] The case states that he was accustomed to sell lead.

Lord ELLENBOROUGH, C. J.—It cannot fairly be questioned in this case but that Swallow had an implied authority to sell. Strangers can

only look to the acts of the parties, and to the external *indicia* of property, and not to the private communications which may pass between a principal and his broker; and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. I cannot subscribe to the doctrine, that a broker's engagements are necessarily and in all cases limited to his actual authority, the reality of which is afterwards to be tried by the fact. It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect of the subject-matter; and there would be no safety in mercantile transactions if he could not. If the principal send his commodity to a place, where it is the ordinary business of the person to whom it is confided to sell, it must be intended that the commodity was sent thither for the purpose of sale. If the owner of a horse send it to a repository of sale, can it be implied that he sent it thither for any other purpose than that of sale? Or if one send goods to an auction-room, can it be supposed that he sent them thither merely for safe custody? Where the commodity is sent in such a way and to such a place as to exhibit an apparent purpose of sale, the principal will be bound, and the purchaser safe. The case of a factor not being able to pledge the goods of his principal confided to him for sale, though clothed with an apparent ownership, has been pressed upon us in the argument, and considerably \*distressed our decision. The court, [\*138] however, will decide that question when it arises consistently with the principle on which the present decision is founded. It was a hard doctrine when the pawnee was told that the pledger of the goods had no authority to pledge them, being a mere factor for sale; and yet since the case of *Paterson v. Tash*, that doctrine has never been overturned. I remember Mr. Wallace arguing in *Campbell v. Wright*, 4 Burr. 2046, that the bills of lading ought to designate the consignee as factor, otherwise it was but just that the consignors should abide by the consequence of having misled the pawnees. The present case, however, is not the case of a pawn, but that of a sale by a broker having the possession for the purpose of sale. The sale was made by a person who had all the *indicia* of property; the hemp could only have been transferred into his name for the purpose of sale; and the party who has so transferred it cannot now rescind the contract. If the plaintiff had intended to retain the dominion over the hemp, he should have placed it in the wharfinger's books in his own name.

GROSE, J.—The question, whether the plaintiff is bound by the act of Swallow, depends upon the authority which Swallow had. This being a mercantile transaction, the jury were most competent to decide it; and if I had entertained any doubt, I should rather have referred the question to them for their determination; but I am perfectly satisfied; I think Swallow had a power to sell.

LE BLANC, J.—The law is clearly laid down, that the mere possession of personal property does not convey a title to dispose of it; and which is equally clear, that the possession of a factor or broker does not authorize him to pledge. But this is a case of sale. The question then is, whether

Swallow had an authority to sell? To decide this, let us look at the situation of the parties. Swallow was a general seller of hemp; the hemp in question was left in the custody of the wharfingers, part in the name of Swallow, and part in the name of the plaintiff or Swallow, which is the same thing. Now for what purpose could the plaintiff leave it in the name of Swallow, but that \*Swallow might dispose of it in his [\*139] ordinary business as broker? if so, the broker having sold the hemp, the principal is bound. This is distinguishable from all the cases, where goods are left in the custody of persons, whose proper business it is not to sell.

BAYLEY, J.—It may be admitted that the plaintiff did not give Swallow any express authority to sell; but an implied authority may be given; and if a person put goods into the custody of another, whose common business it is to sell, without limiting his authority, he thereby confers an implied authority upon him to sell them. Swallow was in the habit of buying and selling hemp for others, concealing their names. And now the plaintiff claims a liberty to rescind the contract, because no express authority was given to Swallow to sell. But is it competent to him so to do? If the servant of a horse-dealer, with express directions not to warrant, do warrant, the master is bound; because the servant, having a general authority to sell, is in a condition to warrant, and the master has not notified to the world that the general authority is circumscribed. This case does not proceed on the ground of a sale in market overt, but it proceeds on the principle, that the plaintiff having given Swallow an authority to sell, he is not at liberty afterwards, when there has been a sale, to deny the authority.

Rule discharged.

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1. In the case of Davidson v. Robertson. it was found by the Court of Session that a power to indorse bills by procuration could not be inferred from acts and circumstances, but required to be established by an express mandate. On an appeal, however, to the house of lords, the judgment was reversed, July 4th, 1815, and the case was remitted, with instructions to receive such evidence as might be properly offered of the facts alleged as to the procuration. Lord ELDON observed,—“A greater error has occurred here than I ever remember to have [\*140] met with, if the commercial law \*be the same in Scotland as in England. In one of the interlocutors there is a finding, that an indorsation for procuration requires a special mandate. My opinion is, that no such thing is absolutely necessary, for if, from the general nature of the acts permitted to be done, the law would infer an authority; the law would say that such an authority might exist without a special mandate, and that an indorsement per procuration might be good though there was no such mandate.”—3 Dow. 218.

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A GENERAL AGENT ACTING WITHIN THE SCOPE OF HIS AUTHORITY BINDS HIS PRINCIPAL, ALTHOUGH ACTING CONTRARY TO EXPRESS PRIVATE INSTRUCTIONS LIMITING OR QUALIFYING THAT AUTHORITY,



IF THESE INSTRUCTIONS ARE UNKNOWN TO THE PARTY CONTRACTING WITH THE AGENT ; BUT A SPECIAL AGENT, ACTING UNDER A LIMITED AUTHORITY CANNOT BIND HIS PRINCIPAL IF HE EXCEEDS HIS AUTHORITY.

I.—FENN v. HARRISON.

June 14, 1790.—E. 3 T. R. 757.

THIS case is given in Volume I., page 350.

II.—WHITEHEAD v. TUCKETT.

April 21, 1812.—E. 15 East, 399.

IN trover for 37 hogsheads of sugar, which was tried before Le Blanc, J., at Lancaster, a verdict was found for the plaintiffs for £3000, subject to the opinion of the court on the following case.

The defendant, a wholesale grocer in Bristol, employed Sill and Co., brokers at Liverpool, to buy and sell on his account great quantities of sugars. The greater part were bought on speculation for resale, and were resold at Liverpool, but some were occasionally sent to the defendant. Sill and Co. usually bought and paid for the sugars in their own names, and in like manner resold and received the purchase-moneys in their own names. They did not draw upon the defendant for the particular \*amount of each purchase, nor remit to him the particular [\*141] bill received in payment on each sale ; but there was a general running account between them. Sill and Co. never had a general authority to buy for the defendant, but in each instance received his directions for so doing ; but when the markets were low, they had sometimes an unlimited authority as to quantity or price. Previously to the transaction which gave rise to the present action, Sill and Co. had not a general authority to sell at their discretion, but received the defendant's directions to sell on each occasion, and were limited as to price ; and upon the transaction in question they had no authority in general, than what appears from the letters hereinafter stated. In May, 1810, Sill and Co. bought in their own names 50 hogsheads of St. Croix sugar of Ewart, Rutson and Co., on account of the defendant, paid for them by their own draft, and reimbursed themselves by drafts on the defendant ; not for the particular amount of this purchase, but on the general account running between them. The samples were sent as usual to Sill and Co.'s office, and remained there till the sale to the plaintiffs hereafter mentioned, and the sugars were removed from the warehouse of the sellers to the warehouse of Sill and Co.

The following are extracts from the correspondence between Sill and Co. and the defendant :—Sill to Tuckett, 7th July, 1810.—“ We attend to your instructions of selling *i a* 200 hogsheads of your sugar as soon

as we can get 4s. to 5s. per cwt. on them, and having an order from C. E. Rawlins of your place, we have sold him forty hogsheads and two barrels, St. Lucia sugar, belonging to you, at 73s., payable by his acceptance at four months, which trust will meet with your approbation." Tuckett to Sill and Co., 9th August, 1810.—"We are in no hurry to part with the sugars under your care, but whenever your market should advance 3s. above the present price, you may sell the whole of the St. Croix sugars (a), bought in May last, at 68s. or 69s., on the best terms to safe men." Sill and Co. to Tuckett, 11th August, 1810.—"We shall not offer any more of yours for the present, unless the prices advance further." Tuckett to Sill and Co., 11th August, 1810.—"By our B. Syke's letter to-day, we see he is arrived at Liverpool, \*and that [\*142] you have disposed of five of our lots of sugar at 4s. profit which we are sorry for, as our late intention was to hold every cask until the prices got much higher, which we are very confident will be the case within six weeks. N.B.—Of course you will not offer any more for sale till further instructions from Bristol." Tuckett to Sill and Co., 27th August, 1810.—"Our raw sugar market, though not brisk, continues to keep up, gives some prices, and we are very confident the price will continue to advance; when you can obtain 10s. per cwt. on cost, we may be inclined to sell a few of our sugars. Though we are poor, we are willing to suspend a little while longer, being very confident far better prices will be obtained by and by." Tuckett to Sill and Co., 22d September, 1810.—"Sugars we are not inclined to sell at present, from an undoubted opinion that they will soon rally again." Tuckett to Sill and Co., 22d October, 1810.—"Our sugar market is brisk and advancing. Could there be any possibility of selling the St. Domingo coffee at anything like cost price? Should the sugar market advance about 2s. higher, you may sell any of our sugars, when cost price and expenses can be obtained, to men of undoubted safety. We see by your letter that raw sugars are much sought after; and if you can get 1s. for these three lots of St. Croix, bought in the fifth month at 69s. 6d., you may let them go. The 38 hogsheads of AB. L., that you value at 71s. would bring here 74s. or 75s.; we attend your reply."

On the 15th of October, 1810, Sill and Co. sold the 50 hogsheads of St. Croix sugar to the plaintiffs, at 69s. per cwt.; and an invoice was made out and delivered by Sill and Co. to the plaintiffs, headed as follows:—"Liverpool, 10th month, 15th, 1810.—Whitehead, Whittle, and Herd. Bought of James Sill and Co., 50 hogsheads sugar, payment in three months and twelve days, equal to four months cash." Then follows a statement of the numbers and weights, amounting to 634c. 2q. 3lb. net, at 69s., £2189, 2s. 4d. The plaintiffs duly paid Sill and Co. for these sugars, according to the contract; and afterwards, on their application, 13 hogsheads were delivered by Sill and Co. to the plaintiffs, and by them removed; namely, three hogsheads on the 20th, and ten [\*143] on the 25th of October, \*1810. Sill and Co. did not inform the defendant of the sale of these sugars to the plaintiffs, nor of the delivery of those last mentioned, nor did they remit to him the purchase-money by them received from the plaintiffs. The remaining thirty-seven

hogsheads continued in the warehouse of Sill and Co. until their bankruptcy, when they were taken possession of by the defendant; and upon his refusal to deliver them to the plaintiffs, this action was brought. If the plaintiffs are entitled to recover, the amount of the damages was agreed to be settled by arbitration at Liverpool. The question for the opinion of the court was, whether the plaintiffs were entitled to recover? if they were, the verdict was to stand, or be entered for such sum as should be awarded; if not, a nonsuit was to be entered.

*Richardson for the Plaintiffs*;—The question turns on the validity of the sale made by Sill and Co. to bind the defendant, which question does not depend upon any nice or critical construction of the letters stated in the case; upon which it will be objected that, as between Sill and Co. and the defendant, the former had no competent authority to sell the particular sugars; but it will be sufficient to bind the principal if the agents had a general authority to sell for him. [LE BLANC, J.—The only question will be, whether Sill and Co. had authority to sell at the particular time; for there is no doubt that the sugars were left in their hands generally, for the purpose of sale, though they might have been directed to hold their hands at the particular time.] The public could not be aware of any restrictions as to time imposed by the letters which had passed between them, nor what were the views of either party touching the probability of getting a better market by delay; but Sill and Co. were generally known as brokers engaged in the sale and purchase of sugars in their own names, and in that character the defendant permitted them to have the custody of the sugars at their warehouse, to dispose of them and receive the price in the usual way of their business, and there was a running account between them. This, therefore, was not the case of a broker pledging the goods of his principal, so as to fall within the exception established by the case of *\*Paterson v. Tash*, [144] 2 Stra. 1178, which has been considered by the court as an anomalous case. The cases of *George v. Clagget*, 7 T. R. 359, and *Rabone v. Williams*, 7 T. R. in notis, show that if a factor be permitted to act in his own name with the goods of his principal, the buyer will be entitled to look to him as the person with whom he deals, and to claim the benefit of a set-off against him. The same doctrine applies where one of several partners is permitted to sell the partnership goods, or a servant the goods of his master, notwithstanding they exceed their authority; yet in the one case the master, in the other the partners, are bound; because the sellers, being entrusted with a general authority, it cannot be expected that a *bona fide* purchaser should be aware of any restrictions which limit it; as is said in *Nickson v. Brohan*, 10 Mod. 109. In *Pickering v. Busk*, ante, 133, it was decided by the court in the last term, that where a broker, whose business it was to buy and sell in his own name, was entrusted by his principal with the apparent control over his property, and sold it, the principal was concluded by such contract; which case is in point, and decisive of the present.

*Scarlett*, for the defendant, contended that the argument for the plaintiffs assumed what the case did not warrant, viz., that Sill and Co. had a general authority to sell, which was restrained only by the letters;

whereas the question intended to be raised was, whether these letters conferred such a general authority as would bind the defendant. The distinction between a general and a special authority is well known, and it may be admitted that where a person is entrusted with the former, he may bind his principal by his acts, though exceeding his particular authority; as if a servant who is employed generally by a horse-dealer to sell his horses, give a warranty with a horse, such warranty will bind a master, though the servant had no authority to give it. But a broker has not such a general authority, but has a special one only, in respect of each parcel of goods entrusted to him for sale; and then, according to *Fenn v. Harrison*, ante, vol. i. p. 350, unless he pursue such special authority in the mode prescribed to him, he cannot bind the principal.

[\*145] In this case the authority of Sill \*and Co. was derived from the letters, the main object of which, so far from giving a general control over the sugars to Sill and Co., was to direct and limit their conduct as to the disposal of them; and the letter, (22d September, 1810,) which was that immediately preceding the sale, expressly states, "that the defendant was not inclined to sell at present, from an undoubted opinion that sugars would soon rally;" so that there was an express prohibition to sell them on the part of the defendant. It will therefore be extending the liability of a principal further than it has been hitherto carried, to hold in this case, merely because the samples were left in the hands of the brokers, and the principal employed them upon other occasions before this, that the acts of the brokers, done in contravention of the restrictions imposed on them, should bind the defendant. He then mentioned a MS. case in 1792 or 1793 to the following effect:—A servant was sent with a horse to a fair, with an express order from the master not to sell it under a certain sum; the servant notwithstanding sold it for a less sum, upon which the master immediately gave notice and brought trover against the purchaser; and it was held that he might recover, because the servant was not his general agent.

*Richardson in Reply*;—The letters show that the sugars were left with Sill and Co., the brokers, for the purpose of sale, which is enough to give them a general authority; and it matters not what were the intentions of the defendant respecting the time of sale. In *Pickering v. Busk*, it did not appear that the principal had conferred any other power of sale than what arose from the circumstance of placing goods in the hands of a common agent for the purpose of sale; yet that was held sufficient to bind the principal. With respect to the MS. case cited, that decision may be admitted without prejudice to the plaintiffs; because there the servant was not a person generally employed by his master in the sale of horses.

Lord ELLENBOROUGH, C. J.—This is an action brought by the plaintiffs to recover the value of certain hogsheads of sugar purchased by them of Sill and Co., who are brokers at Liverpool, which the defendant [\*146] claims to retain as his property, as \*having been improperly disposed of by Sill and Co.; to whom he had entrusted them for the purposes of sale under a limited authority, which they had exceeded. Much of the argument in this case has turned upon the ques-

tion, Whether Sill and Co. were invested with a general authority to sell the sugars? when that question is discussed, it may be material to consider the distinction between a particular and a general authority; the latter of which does not import an unqualified authority, but that which is derived from a multitude of instances; whereas the former is confined to an individual instance. Such was the distinction which governed the decision in *Fenn v. Harrison*, and in the *MS.* case cited. Now in that sense of the term general authority, Sill and Co. were general agents; for they bought and sold in a multitude of instances in their own names, paid and received the money in their own names, and blended their accounts of receipts and payments, without carrying each order to a separate account with the defendant; and although there was a communication between them and the defendant as to the price and time of sale, yet the world was not privy to that communication, and had therefore no means of knowing that their general authority was controlled by the interposition of any check. But even looking to the letters, I find nothing in them to contravene a general power of sale. There are indeed particular allusions as to the price and time of sale, by way of advice and instruction; but I cannot find that they contain any general prohibition to sell, nor any absolute limitation of the terms on which they were to sell. In the letter of the 9th of August, the defendant writes to Sill and Co., "that they may sell the whole of the St. Croix sugars at 68s. or 69s. on the best terms, to safe men." If these expressions are to be construed into so many restrictions of the power of the brokers, it will follow that they were not only limited as to price, but also as to the terms of sale, which, according to the latter were to be the best, and as to the purchasers, who were to be safe men; and if in either of these respects the contract made by them should fail, their principal would have a right to reject it. But if this could be done, in what a perilous predicament would the world stand in respect of their dealings with persons who may have secret communications with their principal. Such communications, therefore, [\*147] must not be taken as limitations of their power, however wise they may be as suggestions on the part of the principal. In another letter, the defendant, alluding to information which his house had received from Sill and Co., of their having disposed of some lots of sugars, remarks, "that they are sorry, as their late intention was to hold every cask until the prices got much higher." Now this is the very language of a person who had given his broker an authority to exercise his discretion upon the subject, and not of one who might have repudiated the contract as being contrary to his instructions. The subsequent letter of the 27th of August to Sill and Co., states, "when you can obtain 10s. per cwt. on cost, we may be inclined to sell a few of our sugars," &c. This is a mere communication of speculation and advice from the principal to the brokers, which presumes a general authority in the brokers, with a desire, on the part of the principal, to direct them in the exercise of it.

The case of *Paterson v. Tash* is not involved in the decision of this; when that case comes directly before us, we shall take occasion to consider it apart. Looking then at this correspondence, (which might per-

haps have been more properly left to the consideration of a jury,) we find that there was a sale of part of these sugars, recognised in one instance by the defendant, and that subsequently there was not any positive prohibition against future sale. Upon the whole, therefore, I think it must be inferred that Sill and Co. had a general authority to sell, and that the sale made by them is valid.

GROSE, J.—I have had considerable doubts on this question as the argument has gone on. I was inclined at first to think, from the letters stated in the case, and from finding the defendant constantly speaking in them of selling at certain prices, that Sill and Co. had not a general authority to sell; but upon consideration, I think the discretion of the brokers was left very much at large in the business; and when that is the case, it would be very dangerous to hold third persons bound by communications passing behind their back between a principal and his broker. I think, therefore, under these circumstances, that the principal was bound by the acts of the brokers.

[\*148] \*LE BLANC, J.—The plaintiffs are the vendees from Sill and Co., of certain hogsheads of sugars, for which they have paid the value; the defendant is the person who employed Sill and Co., and the question is, Whether the court can collect from the circumstances stated, that Sill and Co. had a general authority to sell? In order to determine that question, I think the court is not to look to the correspondence as it relates to this particular parcel of sugars only, but as it is connected with all the circumstances of the case. It appears then, that the goods were left with Sill and Co. for sale; and although they had not a general authority expressly given to them by the letters, yet that in many instances they bought and sold for the defendant in their own names, without making any specific appropriation to the separate account of the defendant either of the moneys received in respect of such sales, or of the moneys expended on such purchases. Thus they appeared acting as general agents for the defendant; and upon one occasion in particular, (already alluded to by my lord,) when the defendant received intelligence of their having sold a lot at a lower price than he intended, instead of repudiating the bargain as contrary to his instructions, we find him indeed expressing his sorrow thereupon, but acquiescing in that which had been done. Can the court then say, after these instances of general authority exercised over the goods of the principal, that in this particular instance the authority of Sill and Co., was controlled, so as to invalidate a sale made by them to a *bona fide* purchaser? I think it cannot, but that under the circumstances we must hold the defendant to be bound by the general authority thus given to Sill and Co. It is unnecessary to enter into the question whether an agent who exceeds his authority can bind his principal.

BAYLEY, J.—I think the only conclusion to be drawn from the facts stated is, that Sill and Co., had a general authority to sell, and that it would be a fraud on the public to hold otherwise. Sill and Co. were common brokers for the sale of sugars; and if the defendant suffered them to buy and sell for him in their own names, and thereby to hold themselves out to the world as the owners of the goods, he must be

taken to \*have given them a general authority. There was nothing to designate him as the owner, neither the bills of sale [\*149] being in his name, nor the price of the goods sold or purchased carried to his separate account; so that in all respects Sill and Co. appeared as the owners. If, therefore, they have abused the confidence reposed in them, the defendant, who entrusted them, and not the plaintiffs, the innocent purchasers, must suffer for it. I agree, therefore, that the plaintiffs are entitled to recover.

PER CURIAM.—Postea to the plaintiffs.

1. "A general agent is a person whom a man puts in his place to transact all his business of a particular kind. Thus a man usually retains a factor to buy and sell all goods, and a broker to negotiate all contracts of a certain description,—an attorney to transact all his legal business,—a master to perform all things relating to the usual employment of his ship, and so in other instances. The authority of such an agent to perform all things usual in the line of business in which he is employed, cannot be limited by any private order or direction not known to the party dealing with him. But the rule is directly the reverse concerning a particular agent, *i. e.*, an agent employed specially in one single transaction, for it is the duty of the party dealing with such a one to ascertain the extent of his authority, and if he do not he must abide the consequences." Smith on Mercantile Law, p. 59.

2. "A general authority arises from a general employment in a specific capacity, such as factor, broker, attorney, &c. When we can say of any one that he is A.'s broker, or A.'s factor, or A.'s attorney, he has then a general authority in the sense in which it is used in the text. But, of course, this does not imply that he has unlimited or unrestrained authority. A. may give his broker, or his factor, or his attorney any instructions that he pleases, and the effect will be this—As between himself and his broker, &c., any deviation from these instructions will render the latter accountable to him for any loss he may sustain thereby. But as regards himself and third parties who may have dealt with the broker, &c., any limitation of the authority not communicated to them can have no effect. A third person has a right to assume, without notice to the contrary, that the person \*whom A. employs generally as his broker, &c., has also [\*150] an unqualified authority to act for his principal in all matters which come within the scope of that employment. In the case of a particular agent, *i. e.*, one whom A. may have employed specially in that single instance, no such assumption can reasonably be made. It then becomes the duty of the party dealing with one whom he knows to be acting for another in the transaction, to ascertain by inquiry the nature and extent of the authority, and if it be departed from or exceeded, he must be content to abide the consequences."—Paley on Agency, by Lloyd, p. 199, note.

3. "The ground of the distinction between general and special agency is the public policy of preventing frauds upon innocent persons, and the encouragement of confidence in dealing with agents. If a person is held out to third persons, or to the public at large, by the principal, as having a general authority to act and to bind him in a particular business or employment, it would be the height of injustice, and lead to the grossest frauds, to allow him to set up his own secret and private instructions to the agents limiting that authority, and thus to defeat his acts and transactions under the agency, when the party dealing with him had and could have no notice of such instructions. In such cases good faith requires that the principal should be held bound by the acts of the agent within the scope of his general authority, for he has held him out to the public as competent to do the acts, and to bind him thereby; the maxim of natural justice here applies with its full force, that he who, without intentional

fraud, has enabled any person to do an act which must be injurious to himself or to another innocent party, shall himself suffer the injury rather than the innocent party who has placed confidence in him. The maxim is founded in the soundest ethics, and is enforced to a large extent in courts of equity. Of course the maxim fails in its application when the party dealing with the agent has a full knowledge of the private instructions of the agent, or that he is exceeding his authority."—Story on Agency, p. 100.

4. The case of *Helyear v. Hawke*, 5 Espinasse, 72, was an action of assumpsit on the warranty of a horse sold by the defendant to the plaintiff. It was contended for the defendant, that he had not given a general agency to the servant to warrant the horse seven years old, but merely that he was sound; and that, therefore, the servant being merely a special agent, and having exceeded his authority, the defendant was not bound. Lord ELLENBOROUGH observed,—“I think the master having intrusted his servant to sell, he is intrusted to do all that he can to effectuate the sale, and if he does exceed his authority in so doing, he binds his master.”

5. The case of *Alexander v. Gibson*, 2 Campbell, 555, was an \*action [151] on the warranty of a horse. A witness was called to prove that the horse had been sold to the plaintiff by the defendant's servant, and that the servant warranted the horse to be sound. It was objected for the defendant, that the plaintiff was bound either to call the servant himself, or to begin by proving that he had authority from his master to warrant the horse. Lord ELLENBOROUGH observed,—“If the servant was authorized to sell the horse, and to receive the stipulated price, I think he was incidentally authorized to give a warranty of soundness. It is now most usual on the sale of horses to require a warranty, and the agent who is employed to sell, when he warrants the horse, may fairly be presumed to be acting within the scope of his authority. This is the common and usual manner in which business is done, and the agent must be taken to be vested with powers to transact the business with which he is intrusted in the common and usual manner. I am of opinion, therefore, that if the defendant's servant warranted this horse to be sound, the defendant is bound by the warranty.”

6. It may be doubted whether the observation of Lord Ellenborough, in the case of *Helyear v. Hawke* be not too absolute, and whether a distinction ought not to be taken between the case of the servant of a private party selling his master's horse, and the case of the servant of a dealer in horses. If in the former case the servant be expressly prohibited from warranting the horse, it may be doubted whether the master would be bound in the event of a warranty having been given. At the same time, a power to warrant may be presumed, and it thus be incumbent on the master to prove that he expressly prohibited the servant to warrant. The distinction now taken appears to be authorized by Mr. Justice ASHHURST in the case of *Fenn v. Harrison*, who observed,—“This brings it to the case put at the bar, of the sale of a horse, where I take the distinction to be that of a person keeping livery stables, and having a horse to sell, directed his servant not to warrant him, and the servant did nevertheless warrant him, still the master would be liable in the warranty, because the servant was acting within the general scope of his authority, and the public cannot be supposed to be cognizant of any private conversation between the master and servant; but if the owner of a horse were to send a stranger to a fair with express directions not to warrant the horse, and the latter acted contrary to the orders, the purchaser could only have recourse to the person who actually sold the horse, and the owner would not be liable on the warranty, because the servant was not acting within the scope of his employment.” The same distinction appears to be taken by Mr. Justice BAYLEY in *Pickering v. Busk*, who observed,—“If the servant of a horse-dealer, with express directions not to warrant, do [152] warrant, the \*master is bound, because the servant having a general authority to sell, is in a condition to warrant, and the master has not notified to the world that the general authority is circumscribed.”

7. In his Commentaries, Mr. Chancellor KENT observes,—“There is a very important distinction on this subject between a general agent and one appointed for a special purpose. The acts of a general agent, or one whom a man puts



in his place to transact all his business of a particular kind, will bind his principal so long as he keeps within the general scope of his authority, though he may act contrary to his private instructions, and the rule is necessary to prevent fraud, and encourage confidence in dealing. But an agent constituted for a particular purpose, and under a limited power, cannot bind his principal if he exceeds his power. The special authority must be strictly pursued. Whoever deals with an agent for a special purpose, deals at his peril when the agent passes the precise limits of his power."—*Kent's Commentaries*, vol. ii. p. 619.

8. Where, however, a servant is in the habit of being intrusted by his master to act within a particular scope of business, the master is bound by the acts of the servant, although contrary to particular instructions, qualifying or limiting the general authority usually conferred upon him. If, therefore, a master permits his servant to purchase goods on credit, he will be liable, although the goods purchased may not have been ordered by the master. The case of *Rusby v. Scarlett*, 5 Esp. 76, was an action for goods sold and delivered. The defence was, that the defendant had given money to his servant to pay for the goods, but which he had embezzled. It appeared in evidence that he had kept a book with his servant, in which were entered the articles procured by him, and the sums advanced to him; but there did not appear to be any connexion between the sums advanced to the servant and the demands which he was to pay, but that the money was advanced generally. The plaintiff contended, that this was not a case where the master had given the servant money to go to market with; that the servant had had money at different times; that bills of parcels had been sent, and that the defendant had settled at different times, without calling for vouchers of the payment, which he ought to have done; and that the law relied upon by the defendant, only applied to cases where the master gave the servant money specially to pay for the goods. Lord ELLENBOROUGH observed,—“The general rule to subject the principal to the act of the agent is this, the agency must be antecedently given, or be subsequently adopted. There must, in the latter case, be some act of recognition; but if I authorize a man to obtain credit on my account, and he gets the goods on such credit, unless I have paid him I am myself liable; but I go farther, for if the goods were taken [\*153] up, and the money given afterwards to the servant to pay, I am inclined to think the master liable if the servant has not paid over the money; for he has given authority to take up goods on credit. It is therefore material to see when the money was given. If the servant was always in cash before-hand, to pay for the goods, the master is not liable, as he never authorized him to pledge his credit; but if the servant was not so in cash, he gave him a right to take up the goods on credit; and I think he would be liable, as the servant has not paid the plaintiff, though he might have received the money from the defendant, his master.”

9. An agent who is employed generally to do any act, is authorized to do it in the usual way of business, and if he does it in any unusual way, his principal is not bound by his acts. The case of *Wiltshire v. Sims*, 1 Campbell, 258, was an action for not transferring stock. The broker employed by the defendant to sell had sold it on a bill for fourteen days, and paid on the note to his bankers, where it was attached for a debt of his own. At the end of the fortnight the defendant refused to make the transfer, as he had received no part of the purchase-money. It was proved that the stock belonged to trustees, and that as the transfer could not be made till the expiration of a fortnight, when there was to be a meeting of the trustees, the broker in taking the note had acted with a view to his employer's advantage, thinking that the stock might fall before the transfer could be made. It was contended for the plaintiff, that the defendant must have empowered his agent to sell the stock in the manner most for his interest, and that the loss ought to fall upon him, and not upon the plaintiff, who had paid for the stock, under the natural impression that the agent had authority to sell it immediately, though a short time was to intervene before it could be transferred in the books of the trustees. The plaintiff was nonsuited. Lord ELLENBOROUGH observed,—“When the defendant employed the broker to sell the stock, he employed him to sell it in the usual manner. He made him his agent for common purposes in a transaction of this sort. But did ever any one hear

of stock being absolutely discharged for a bill at fourteen days? Has a broker in common cases power to give credit for the price of the stock which he agrees to sell? The broker here sold the stock in an unusual manner, and unless he was expressly authorized to do so, his principal is not bound by his acts."

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[\*154] \*THE REPRESENTATIONS OF AN AGENT RESPECTING THE SUBJECT-MATTER OF A CONTRACT WILL BIND HIS PRINCIPAL IF MADE AT THE VERY TIME OF THE CONTRACT, AND CONSTITUTING PART OF THE RES GESTÆ; AND THE FRAUDULENT OR NEGLIGENT CONCEALMENTS OF AN AGENT, WHERE THE OTHER CONTRACTING PARTY IS ENTITLED TO A FULL DISCLOSURE, WILL ALSO AFFECT HIS PRINCIPAL.

### FITZHERBERT v. MATHER.

Mich. Term, 1785.—E. 1 T. R. 12.

THIS was an action on a policy of insurance for £110, underwritten by the defendant on the 21st of September, 1782, at six guineas per cent., on a cargo of oats on board the ship "Joseph," lost or not lost, at and from Hartland to Portsmouth, beginning the adventure from the loading thereof on board the said ship at Hartland. The defendant pleaded the general issue, and paid the premium into court. The jury found a verdict for the plaintiff at the sittings at Guildhall, before Buller, J., after last Trinity Term, subject to the opinion of the court on the following case:—

"That on the 27th of July, 1782, William Bundock of Pool, agent for the plaintiff, contracted with Richard Thomas of Hartland, a corn-factor, for the purchase of 500 quarters of oats, to be consigned to William Fuller at Portsmouth, on the plaintiff's account, and directed Thomas to send him (Bundock) a bill of loading and invoice, and also a like bill of loading and invoice to the plaintiff, at Cuthbert Fisher's, Esq., London. That, in pursuance thereof, Thomas shipped the oats on board the ship insured, which sailed from Hartland on the 16th of September, 1782, and was lost the same day off the pier of Hartland. That on the 16th of September, 1782, Thomas wrote the two following letters to William Bundock and Cuthbert Fisher."

"To Mr. William Bundock.

*"Hartland, Sept. 16; 1782.*

"SIR,—This morning I loaded the Joseph with 175 quarters of oats, to the address of William Fuller, Portsmouth, and the \*sloop [\*155] sailed immediately; but I am afraid the wind is coming to the westward, and will force her back. I have engaged Harvey, which hope will carry the rest; and if the weather does not come foul, hope to despatch him this week. I have sent a bill of loading and a letter by the master to Mr. Fuller; also I have sent a bill of loading and advice to Mr. Fisher, that he may insure if he likes, as the equinox is near, &c.

"R. THOMAS."

"To Cuthbert Fisher, Esq.

*"Hartland, Sept. 16, 1782.*

"SIR,—By an order from Mr. William Bundock, of Pool, I shipped this day, on board the Joseph, who immediately sailed for Portsmouth, a cargo of oats as under; and by the same order, as well as the orders of Thomas Fitzherbert, Esq., I took the liberty of drawing on you, at three days' sight, in favour of Messrs. Scott and Willes, or order, £106, 10s., to be placed to the account of Thomas Fitzherbert, Esq. I wish the whole safe to hand, and expect another vessel to be loaded this week, weather permitting. This evening appears stormy. I remain, &c.

"R. THOMAS."

|  |                 |
|--|-----------------|
| "Shipped 175 quarters of sweet dry oats, at 12s. 2d. per quarter, on board the Joseph of Pool, | £106 9 2        |
| Bills of lading,   | 0 0 10          |
|  | <hr/> £106 10 0 |

"That about six or seven o'clock of the evening of the 16th September, Richard Thomas heard a report that the ship was on shore; and at six o'clock in the morning of the 17th, he knew the ship was lost. That the mode of sending letters from Hartland to London is as follows: the letters are collected by a private hand, who goes with them from Hartland to Bideford, about one or two o'clock on the day the post sets out from Bideford, and which leaves Bideford about nine o'clock in the evening. That the 16th of September was not a post-day, and the above letters did not leave Hartland till one o'clock in the afternoon on the 17th, which was the post-day from \*Bideford to London; and [\*156] the letters which went from Bideford by the post of that evening, were received in London on the 20th of September. That on the 19th the plaintiff wrote the following letter to Cuthbert Fisher, Esq. :—

*"Stubb Lodge, near Portsmouth,  
Sept. 19, 1782.*

"Dear Fisher,—My correspondent, Mr. William Bundock, of Pool, having informed me he has sent two sloops to Hartland, in Devonshire, to load oats on my account and risk, I beg the favour of you to insure my amount of the cargoes to Portsmouth, as soon as the bills are sent you.

T. FITZHERBERT.

"That the last-mentioned letter, together with the aforesaid letter from R. Thomas to Mr. Fisher, dated the 16th of September, were both received by Fisher in London on the 20th of September, and he thereupon directed the insurance in question to be effected. That, on the 21st of September, the defendant underwrote the policy stated in the declaration. If the court should be of opinion that the plaintiff may recover, then the verdict to stand; if not, then a verdict for the defendant."

*Bower*, for the plaintiff, made two questions :—1st, supposing Thomas to be the agent of the plaintiff, whether his negligence, in not sending an account of the loss of the ship, shall vacate the policy?

The whole that is required in making these kind of contracts is, that they be made *bona fide* between the insured and the insurer. If there be a real disclosure as between them, the act of a third person is not material.—5 Burr. 2084.

2ndly, whether Thomas be the plaintiff's agent? All the orders which Bundock had given to Thomas were to send such a quantity of oats on board a ship, and to send a bill of lading; the moment he had done that his agency ceased.

Cowper, for the defendant, contended, that Thomas was the plaintiff's [\*157] agent. Thomas suffered a letter to go to Fisher, \*informing him that the ship sailed, several hours after he knew she was lost; he himself knowing an insurance might be made, as appears by his letter, dated the same day, to Bundock. The letter having been written before the loss was known makes no difference, because it did not go before Thomas actually knew of the loss. If there had been no reference to Thomas's letter, there could have been no insurance; this connects him with the principal. The case of Stewart v. Dunlop, in the house of lords in 1785, on an appeal from the Sessions of Scotland, is very strong. That was where a clerk of the assured, knowing of the loss of the ship, suffered the merchant to cause a policy to be made, without disclosing what he knew; on which ground the policy was vacated.

Lord MANSFIELD, C. J.—This policy was effected by misrepresentation; and that misrepresentation arose from the proper agent of the plaintiff, who gave the intelligence. Now whether this happened by fraud or negligence, it makes no difference; for in either case the policy is void.

It was by misrepresentation; because the underwriter was warranted, on the information of the agent, to take for granted, that on the 17th September, at twelve or one o'clock, the ship was safe; for the agent gave an account of the ship being loaded, and said nothing of what had happened to her. Then there was strong ground to believe on this letter, that she was safe when the post came away.

How did this misrepresentation happen? The agent wrote the letter. And supposing he was not an agent, he gave information to Fisher, as well as to the plaintiff, to make the insurance. He acted honestly when he wrote the letter; but on the 16th, at night, he heard the ship was on shore, and the next morning he knew that she was lost. The post did not go out till the afternoon of that day; therefore he had full opportunity to send an account of the loss.

If Thomas were not guilty of fraud, at least he was guilty of great negligence; and this policy, being effected by misrepresentation, is void.

WILLIS, J.—Thomas must be considered as the agent of the [\*158] \*plaintiff. He shows by his first letter that he acted by the orders of Bundock, as well as of the plaintiff; and being his agent, the plaintiff must be liable for any misrepresentation of Thomas; and this is a gross misrepresentation.

ASHHURST, J.—On general principles of policy, the act of the agent ought to bind the principal; because it must be taken for granted, that

the principal knows whatever the agent knows. And there is no hardship on the plaintiff; for if the fact had been known, the policy could not have been effected,

**BULLER, J.**—In order to show that Thomas was not the agent for the plaintiff, Mr. Bower assumed one fact which is contrary to the case; for he said the insurance was not made in consequence of Thomas's letter; but the fact is not so. According to the plaintiff's letter, the insurance was not to be made till Thomas's letter arrived; and the plaintiff expressly refers to the letter of Thomas, "when it shall arrive;" it was therefore the foundation of the insurance.

Though the plaintiff be innocent, yet if he build his information on that of his agent, and his agent be guilty of a misrepresentation, the principal must suffer. It is the common question every day at Guildhall, when one of two innocent persons must suffer by the fraud or negligence of a third, which of the two gave credit? Here it appears that the plaintiff trusted Thomas, and he must therefore take the consequences.

Judgment for the defendant.

1. The case of *Helyear v. Hawke*, 5 Esp. 72, was an action of assumpsit on the warranty of a horse made by the groom of the defendant. The defendant denied having given the warranty; and it was objected that the declarations of the groom as to the age or qualities of the horse were not admissible to charge the defendant. Lord **ELLENBOROUGH** observed,—“If the servant is sent with the horse by his master, and he gives the directions respecting \*its sale, I [\*159] think he thereby becomes the accredited agent of his master, and what he has said at the time of the sale, as part of the transaction of selling respecting the horse, is evidence; but an acknowledgment to that effect, made at another time, is not so. It must be confined to the time of the actual sale, and when he was acting for his master.

2. The case of *Peto v. Hague*, 5 Esp. 134, was an action to recover the penalty for selling coals short of measure, the coals having been sold as Pool measure. The defendant objected to a witness stating a conversation which he had had with the nephew of the defendant, by whom his business was conducted, and in which conversation he had asked the nephew whether the coals then lying in the punt were to be sold by wharf or Pool measure. Lord **ELLENBOROUGH** ruled, that what was said by the agent was evidence, and observed,—“What the agent might have said respecting a former sale made by the defendant, or on another occasion, would not be evidence to affect his master, but what he said respecting a sale of coals then about to take place, and respecting the disposition of the coals then lying at the wharf, which were the object of sale, was in the course of his employment for the defendant, and was evidence to affect his master.”

3. In the case of *Burt v. Palmer*, 5 Esp. 145, it was held, that where an agent has been employed to pay for work done, and the workmen are referred to him for payment, an acknowledgment of the debt by the agent took the case out of the Statute of Limitations. The defendant contended, that there must either be the admission of the principal himself, or that the promise of the agent, upon whom the plaintiff relied, should be called; or that, though the acts of an agent are admissible evidence where his agency is once established, yet what an agent had said was not evidence, as he might himself be called. The plaintiff contended, that as the agent had in fact adopted the debt by the defendant's direction, he was bound by the admission of his agent. Lord **ELLENBOROUGH** observed,—“It has been solemnly decided by the twelve judges at Hastings' trial, that where a person is referred to to settle or adjust an account of business, what he says is

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evidence if it is connected with the business which is referred to, and therefore the agent's admission of the debt is binding on the defendant."

4. In the case of *Langhorn v. Allnutt*, 4 Taunt. 510, it was held, that letters of an agent to his principal, in which he gave him an account of his transactions, are not admissible as evidence against the principal; but that letters, written by an agent in making a contract, which formed part of the contract, or of the *res gesta* are evidence against the principal. GIBBS, J., observed,—“There is a clear distinction between these letters which are admissible in evidence and [\*160] those which are not. When it is proved \*that A. is agent of B., whatever A. does, or says, or writes in the making of a contract, as agent of B., is admissible as evidence, because it is part of the contract which he makes for B., and therefore binds B.; but it is not admissible of his account of what passes. Now, what are these letters? These are not part of the contract itself, or of the *res gesta*, but they are the account which the agent renders to his principal of what he is doing. These are therefore not admissible.”

WHERE A FACTOR SELLS GOODS WITHOUT DISCLOSING THE NAME OF HIS PRINCIPAL, THE PURCHASER IS ENTITLED TO SET OFF A DEBT DUE TO HIM BY THE FACTOR, IN ANSWER TO THE DEMAND OF THE PRINCIPAL.

#### GEORGE v. CLAGETT.

June 30, 1797.—E. 7 T. R. 359.

ON the trial of this action, which was assumpsit for goods sold and delivered to the amount of £142, 1s. 9d., before Lord Kenyon at the Guildhall Sittings, the case appeared to be this. The plaintiff, a clothier at Frome, employed Messrs. Rich and Heapy in London, Blackwell-hall factors, as his factors, under a commission *del credere*, who besides acting as factors, bought and sold great quantities of woollen cloths on their own account, all their business being carried on at one warehouse. The factors sold at twelve months' credit, and were allowed two and a half per cent. On the 30th of September, 1795, Delvalle, a tobacco broker, and who had been in habits of dealing with the defendants, bought several parcels of tobacco of them, and gave them in payment a bill of exchange for £1198, 16s., drawn by one Fisher on Rich and Heapy, on the 24th of September, 1795, payable two months after date to J. Stafford, who indorsed to Delvalle, who indorsed it over to the defendants, it having been previously accepted by Rich and Heapy. On the 12th of October, 1795, the defendants bought a quantity of woollen cloths for exportation of Rich and Heapy, amounting to £1237, 18s. 3d., at twelve [\*161] months' credit; the \*goods were taken out of one general mass in Rich and Heapy's warehouse; Rich and Heapy made out a bill of parcels for the whole in their own names, and the defendants did not know that any part of the goods belonged to the plaintiff. Early in November, 1795, Rich and Heapy became bankrupts; and afterwards, on the 20th of the same month, the plaintiff gave the defendants notice not to pay Rich and Heapy for certain cloths specified, part of the above, amounting to £142, 1s. 9d., they having been his property, and having

been sold on his account by Rich and Heapy on commission. The question was, Whether the defendants were or were not entitled to set off their demand against Rich and Heapy on the bill of exchange, on the ground that the defendants dealt with them as principals; Lord Kenyon was of opinion, that they were, as well on principle as on the authority of *Rabone v. Williams*, and a verdict was accordingly found for the defendants.

A rule having been obtained, calling on the defendants to show cause why the verdict should not be set aside, and a new trial had, on the authority of the case of *Estcott v. Milward*, Co. Bank. Laws, 236 ;

*Gilbs* and *Giles* were now to have shown cause against that rule; but *Erskine* and *Walton* were called upon to support it. They relied on the cases of *Scrimshire v. Alderton*, and *Estcott v. Milward*, as reported in Co. Bank. Laws, to show that under the circumstances of this case, the principal might resort to the buyer at once, he having given notice before actual payment by the defendants to the factors.

But a more accurate note of the case of *Estcott v. Milward* having now been obtained from Mr. J. Buller, before whom that cause was tried, and read,

The court were clearly of opinion, that the directions given by the learned judge on the trial of this cause were right; and \*that this case was not distinguishable from that of *Rabone v. Wil-* [\*162]  
*liams*. Therefore they Discharged the rule.

The case of *Rabone, Jun., v. Williams*, 1785, was an action for the value of goods sold to the defendant by means of the house of *Rabone, Sen., and Co.*, at Exeter, factors to the plaintiff. The defendant, the vendee of the goods, set off a debt due to him from *Rabone and Co.*, the factors, upon another account, alleging that the plaintiff had not appeared at all in the transaction, and that credit had been given by *Rabone and Co.*, the factors, and not by the plaintiff. Lord MANSFIELD, C. J.,—"Where a factor, dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him, to all intents and purposes, as the principal; and though the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor in answer to the demand of the principal. This has been long settled."—7 T. R. 360.

ALTHOUGH A FACTOR MAY BUY AND SELL IN HIS OWN NAME, AS WELL AS IN THE NAME OF HIS PRINCIPAL, A BROKER IS NOT ENTITLED TO DO SO; AND WHERE HE DOES SO, HE ACTS BEYOND THE SCOPE OF HIS AUTHORITY, AND THE PURCHASER CANNOT SET OFF A DEBT DUE TO HIM BY THE BROKER AGAINST THE DEMAND MADE BY THE PRINCIPAL.

### BARING v. CORRIE.

Nov. 13, 1818.—E. 2 B. & Ald. 137.

ASSUMPSIT for goods sold and delivered. Plea, general issue. The

cause was tried before Lord Ellenborough, C. J., at the London sittings after Trinity Term, 1816, when a verdict was found for the plaintiffs, with £1423, 3s. 6d. damages, \*subject to the opinion of the court [\*163] upon the following case, either the plaintiffs or the defendants being at liberty to turn the same into a special verdict.

The plaintiffs are merchants in London, and in the month of June, 1815, employed Messrs. Coles, as their brokers to sell for them a parcel of sugars. Coles and Co. sold to the defendants the sugars on the 27th June, 1815, and on the same day delivered to the plaintiffs the following sale note:—"Sold for account of Messrs. Baring, Brothers, and Co., to Messrs. W. and E. Corrie, per Active, N.L.R. 51/100—50 hogsheads Surinam sugar, at 85s." Coles and Co. were merchants as well as brokers, and bought and sold largely on their own account, and had, before the time of the sale of the sugars in question, dealt with the defendants both in buying and selling on their own account, and in the course of such dealing had previously bought goods of the defendants, for which they had given them their acceptances for £2700, which fell due on the 25th and 26th August, 1815. At the time of the sale, Coles and Co. did not disclose to the defendants that they acted as brokers, but sold the sugars to them in their own names, and sent them the following note:—"Sold Messrs. Corrie and Co., per Active, N.L.R. 51/100—50 hogsheads of Surinam sugar, at 85s. June 27th, 1815." The defendants afterwards, on or about the 10th or 11th of July, 1815, received the following invoice, dated 27th June, 1815, from Coles and Co.:—"Messrs. E. Corrie, bought of Coles and Co., per Active, N.L.R., 50 hogsheads Surinam sugar, at 85s. per cwt." The prompt or time of payment of the sugars, according to the usual course of the sugar trade, was two months. Coles and Co., as sworn brokers, kept a book, in which they entered a memorandum of every contract made by them as such brokers, and amongst the rest was the memorandum of the sale of these sugars to the defendants made at the time of sale:—"Bought of Baring, Brothers, and Co., for account of Corrie and Co., per Active, N.L.R. 51/100 hogsheads Surinam sugar, at 85s." But the defendants never saw the book or memorandum, nor did they ever desire to see it till after the bankruptcy of Coles and Co., although they might at any time have seen it, [\*164] by calling at the counting-house. \*At the time of the sale, Coles and Co. were employed by the plaintiffs, as their brokers, not only to sell for them their imported goods, but also to receive from the buyers thereof the price when due, but they did not receive a *del credere* commission. Coles and Co. became bankrupts on the 14th July, 1815, and the prompt upon the sugars expired upon the 27th August. On the 3d July the defendants received from Coles and Co. the following order for the delivery of the sugars from the West India docks, where they were landed and then lying;—"To the principal store-keeper of the West India Docks. Deliver to the order of Messrs. W. and E. Corrie, the under-mentioned goods, imported in the month of June, 1815, and entered by John Deacon, per ship Active, Captain Mustard, from Surinam, (prime dock rates thereon being paid,) June, 1815, N.L.R. 51/100—50 hogsheads sugar. For Baring, Brothers, and Co. (Signed) John



Walker." John Walker was the custom-house clerk of the plaintiffs, and John Deacon one of the partners in the house of Baring, Brothers, and Co., and one of the plaintiffs in the cause. By the usage in the West India Docks, the sugars, or other produce imported, remain in the names of the importer, or person making the entry, until such time as some purchaser thereof chooses to have the goods rehoused and entered in his name. In the meantime, and until such rehousing takes place, the order for delivery must be signed by the importer or his agent, whatever number of sales may have been made of them; and such order is made out for delivery to the first purchaser, unless the importer should have received a written direction from the first purchaser to make it out to some other person; and that person, if he sells, indorses over such order to his vendee, unless, as in the former cases, such vendee should in like manner, by order in writing, direct the indorsement to be made out to some other person. On the 22nd August, 1815, the following letter, bearing date the 27th July, was sent by the plaintiffs to the defendants, being five days before the prompt upon the sugars expired:—"We request you will settle with Mr. Edward Kensington, for the amount of M.L.R. 50 hogsheads sugar, per Active, sold you by Coles and Co., on the 27th June last." The defendants returned the following answer, dated August, 23d:—"We are surprised at the \*directions contained in your letter, dated 27th July, last, but only delivered to [ \*165 ] us yesterday, respecting 50 hogsheads sugar, sold by Coles and Co., on the 27th June. We consider Coles and Co. as the proprietors of these sugars, and therefore the same will be settled for in account with them or their assignees." On the 14th July, 1815, when Coles and Co. became bankrupts, the defendants were the holders of their acceptances for £2700.

This case was argued in Easter Term by Puller for the plaintiffs, and in the present Term by Scarlett for the defendants. The principal arguments for the plaintiffs were, that the defendants must have known that Coles and Co., were not selling in their own names, inasmuch as the truth of the transaction was registered in their broker's book, which the defendants might have inspected, if they had chosen to do so; and that the note delivered by them would not have bound the defendants unless it had been delivered in their character of brokers; that they possessed none of the *indicia* of property in the goods, all of which appeared to belong to the plaintiffs; and that it was impossible that the plaintiffs could know that the goods had not been sold by Coles and Co., in the ordinary way as brokers, for the note delivered to them was precisely in the usual form. And if they were not to succeed in the present action, no merchant could ever again trust a broker with safety. The cases of *George v. Clagett*, ante, p. 157; *Rabone v. Williams*, 7 T. R. 360; *Estcott v. Milward*, Co. Bank Laws, 236; *Scrimshire v. Alderton*, 2 Str. 1182; *Morris v. Cleasby*, 4 Maule and Selw. 566; and *Moore v. Clementson*, 2 Camp. 22, were cited, and it was contended, that the rule on which the right of set-off in those cases depended was this, that where the principal has by his conduct allowed the factor to hold himself out to the world as the owner of the goods, he must take

the consequences. Here, however, the plaintiffs had done no such thing; and, besides, all those cases were cases of factors, between whom and brokers there is a very material difference.

For the defendant it was urged, that this case was not to be [\*166] \*distinguished from *George v. Clagett*, which was still a valid decision; that as to the circumstances relied on, to show that the defendants knew that Coles and Co., were selling as brokers, they were not conclusive. It appeared as a fact, that they acted both as brokers and merchants, and therefore a party with whom they dealt, might naturally enough in a case where they did not mention the name of their principal, conclude that they were the principals themselves in the transaction. And the order for delivery of the goods being given by the plaintiffs, made no difference, for the only thing that it proved was, that they were the original importers. The only distinction between a factor and broker is, that the one has possession of the bulk of the goods, and the other only of the sample; both are in the material point the same, viz., the representatives of the real owner. And the rule of law laid down in *Hern v. Nichols*, Salk. 289, being that where one of two innocent persons must suffer by the fault of a third, the loss is to fall on him who has reposed the confidence, it will follow that in this case the loss must fall on the plaintiffs, whose agents Coles and Co. were in this transaction, and who had reposed an unusual confidence in them, by permitting them not merely to sell for them, but also to receive the price of the goods when sold.

ABBOTT, C. J.—If the defendants were to succeed in this case, the effect would be, that the goods of one man would be applied in discharge of the debt of another. I am not disposed to come to such a conclusion, unless compelled to do so by authorities which I do not find in this case. It is said, that where a loss is to fall on one of two innocent parties by the deceit of a third, that it should fall on him who employs and puts a trust and confidence in the deceiver. But this rule is by no means universal. Suppose a factor, who is intrusted with the possession of goods, pledges the goods, the real owner may recover them in trover against the person with whom they are pledged. And so, also, if a master trusts his servant with plate or other valuables, and the servant sells them, still, unless they are sold in market overt, the master may recover them from the innocent purchaser. These exceptions show [\*167] that the \*principle is by no means universal. But in this case, has there been any negligence on the side of the plaintiffs? or rather, has there not been great negligence on the side of the defendants? Coles and Co., it appears, acted in the double capacity of merchants and brokers; and that fact was well known to the defendants. Now the distinction between a broker and factor is not merely nominal, for they differ in many important particulars. A factor is a person to whom goods are consigned for sale by a merchant, residing abroad, or at a distance from the place of sale, and he usually sells in his own name, without disclosing that of his principal; the latter, therefore, with full knowledge of these circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name.

But the broker is in a different situation; he is not trusted with the possession of the goods, and he ought not to sell in his own name. The principal, therefore, who trusts a broker, has a right to expect that he will not sell in his own name. In all the cases cited, the factor was in actual possession of the goods, and the purchasers could not know whether they belonged to him or not. And at all events, they knew that he had a right to sell the goods. But the case of a broker is quite distinguishable. The plaintiffs in this case have only reposed the usual confidence which every merchant must place in his broker, and if the defendants should succeed, it would not be safe for any merchant ever hereafter to employ a broker; for the latter might, by delivering to the buyer a false note, defeat the rights of his principal altogether. It is argued, indeed, that there are other facts in this case from which it is to be inferred that the plaintiffs reposed a more than usual confidence in Coles and Co., and for this purpose, that part of the case was relied upon which states that they were employed by the plaintiffs as their brokers, not only to sell for them the several goods imported into this country, but also to receive, when due, the price of such goods from the buyers. But inasmuch as this fact applies only to the receipt of the price of goods sold by them as brokers, it seems to me that that fact does not alter the case. But in what situation did the defendants stand in respect to Coles and Co., and what did they omit to do? They knew \*that Coles and Co., acted both as brokers and merchants, and if they meant to deal with them, as merchants, and to derive [\*168] a benefit from so dealing with them, they ought to have inquired whether in this transaction they acted as brokers or not; but they made no inquiry. They had the name of the ship in which the goods had been imported, and they might have made inquiries into the circumstances of the case, if they had not chosen to remain in ignorance. There is, therefore, a clear omission on their part, and they do not stand in a situation so completely free from blame as the plaintiffs do. There is another circumstance, which shows, that if they did not know that Coles and Co., were acting as brokers in this case, it was because they chose not to know it. It appears that they received a sale note, and were not required to sign a bought note. Now, without entering into the question, whether or not, under such circumstances, the bargain could be enforced, it is quite sufficient to say, that the ordinary course of dealing was not pursued, and that enough appears to show, that the defendants negligently abstained from making those inquiries which they ought to have made. I think, therefore, that they ought not to be allowed the set-off which is claimed; and my opinion is founded on the difference between the characters of factor and broker, and on the plain distinction between the cases cited and this. For even admitting it to be true, that where two persons, equally innocent, are prejudiced by the deceit of a third, the person who has put the trust and confidence in the deceiver should be the loser, I think the defendants are the persons who have in this case placed a more than usual confidence in Coles and Co., and that they must bear the loss occasioned by the act of the latter.

BAYLEY, J.—I am entirely of the same opinion. This is an action brought by a merchant, to recover the price of his own goods, and he ought therefore to succeed, unless payment, or something equivalent to it, appears to have taken place. The demand, however, is resisted on the ground that the defendants, who were buyers of the goods, did not purchase them of the plaintiffs, but of Coles and Co., and that they have a counter demand against them, which they are entitled to set off against \*the price of the goods. A proprietor, generally speaking, [\*169] is entitled to receive the price of his own goods, unless, by improper conduct on his part, he has enabled some other person to appear as proprietor of the goods, and, by that means, to impose on a third person, without any fault on the part of that person. That is the true meaning of the rule laid down in *Hern v. Nichols*, Salk. 289. There arise then three questions; first, Did the plaintiffs enable Coles and Co. to appear as proprietors of the goods, and to practise a fraud upon the defendants? secondly, Did Coles and Co. actually practise a fraud? and, thirdly, Did the defendants use due care and diligence to avoid such fraud? All these questions must, under the circumstances of this case, be answered against the defendants. It appears that Coles and Co., were both brokers and merchants, and that they, on the 27th June, 1815, were empowered to sell the goods in question. They delivered to the plaintiffs a sold note exactly in the proper form, supposing them to have sold in their character of brokers; and they delivered to the defendants a bought note, exactly suited to the case of their having sold as brokers, without having disclosed the name of the seller. If it were even doubtful whether Coles and Co. sold as merchants or not, there was at least enough to have induced the defendants to make inquiry. For, supposing them to sell in their character of brokers, it was not necessary for them to take a counter-note from the defendants; but, if they had sold as merchants, that would be necessary. When, therefore, they delivered only a sale note, and required none in return, that ought to have raised a strong presumption in the minds of the defendants, that the sale was in their character of brokers. And there is nothing inconsistent in that view of the case; for Coles and Co., do not say that they sell the goods as their own, and the defendants ask no questions on that subject. Then, on the 3d of July, comes the delivery-order signed by the plaintiffs; at that time, therefore, the defendants must have known that the plaintiffs were parties concerned, and and might have satisfied any doubts which they entertained upon the subject. It is, besides, to be observed, that the plaintiffs did not trust the brokers with either the muniments of their title, or the possession of the goods, as was done both in the case of *Rabone v. Williams*, and that [\*170] of *\*George v. Clagett*. There is another circumstance by which the defendants might easily have ascertained whether Coles and Co. acted as brokers or not. According to the usual course of dealing, a broker is bound to put down in his book an account of the sales made by him in that capacity, and in fact that was done in this case; so that if the defendants had asked to see the book, they would instantly have discovered whether Coles and Co. acted as brokers or not. I think,

therefore, that it appears from these circumstances, the plaintiffs did not by their conduct enable Coles and Co. to hold themselves out as the proprietors of these goods, and so to impose on the defendants; that the defendants were not imposed upon, and even supposing that they were, that they must have been guilty of gross negligence. Besides, when Coles and Co. stood at least in an equivocal situation, the defendants ought, in common honesty, if they bought the goods with a view to cover their own debt, to have asked in what character they sold the goods in question. I therefore cannot think that the defendants believed, when they bought the goods, that Coles and Co. sold them on their own account; and if so, they can have no defence to the present action. The course of dealing, it appears, was for the brokers to receive for the plaintiffs the price when due; if, therefore, the defendants had remained ignorant of the state of things, till after that period had arrived, the case might have been different; but, before that time arrived, it appears that they were distinctly informed, that the plaintiffs were the proprietors of the goods. There must therefore be judgment for the plaintiffs.

HOLROYD, J.—I am of opinion, that the defendants have not any right of set-off in this case. A factor who has the possession of goods, differs materially from a broker. The former is a person to whom goods are sent or consigned, and he has not only the possession, but in consequence of its being usual to advance money upon them, has also a special property in them, and a general lien upon them. When, therefore, he sells in his own name, it is within the scope of his authority; and it may be right, therefore, that the principal should be bound by the consequences of such sale; amongst which, the right of setting off [\*171] \*a debt due from the factor is one. But the case of a broker is different; he has not the possession of the goods, and so the vendee cannot be deceived by that circumstance; and besides the employing of a person to sell goods as a broker, does not authorize him to sell in his own name. If, therefore, he sells in his own name, he acts beyond the scope of his authority, and his principal is not bound. But it is said, that by these means the broker would be enabled by his principal to deceive innocent persons. The answer however is obvious, that that cannot be so, unless the principal delivers over to him the possession and *indicia* of property. The rule stated in the case in Salkeld must be taken with some qualifications; as, for instance, if a factor, even with goods in his possession, acts beyond the scope of his authority, and pledges them, the principal is not bound; or if a broker, having goods delivered to him, is desired not to sell them, and sells them, but not in market overt, the principal may recover them back. The truth is, that in all cases, excepting where goods are sold in market overt, the rule of *caveat emptor* applies. I think, therefore, that this case differs materially from the cases cited, which are those of principal and factor, and that therefore this claim of set-off cannot be allowed.

Judgment for plaintiffs.

A DEL CREDERE COMMISSION DOES NOT PLACE A BROKER IN THE SITUATION OF A PRINCIPAL, AS SUCH COMMISSION IMPORTS MERELY A GUARANTEE OF THE SOLVENCY OF THE PURCHASER, AND BINDS HIM TO PAY THE PRICE, IF THE PURCHASER DOES NOT.

### MORRIS v. CLEASBY.

Feb. 7, 1816.—E. 4 M. & S. 566. Eng. Com. Law. Reps., vol. 30.

ASSUMPSIT for not rendering to the bankrupts an account of the sale of goods delivered by them to the defendant to sell, and sold by him. Money counts. Plea, non-assumpsit, with a notice of set-off.

[\*172] \*At the trial before Lord Ellenborough, C. J., at the sittings after Trinity Term, 1814, a verdict was found for the plaintiff for £1090, 7s. 8d., subject to the opinion of the court on the following case :—

In October, 1810, the defendant, a broker in London, advertised for sale by public auction, on the 23d of that month, several lots of casks of spirit of turpentine, under certain printed particulars and conditions; one of which was, that the lot or lots should be cleared at the buyer's expense in fourteen days from the date of sale, and the remainder of the purchase-money to be paid on delivery in approved bills at two months, allowing  $1\frac{1}{4}$  per cent. discount. On the morning of the sale, the bankrupts, who were merchants in London, wrote to the defendant, directing him,—

“Provided the 88 casks of turpentine he had for sale that day could be exported duty free, to buy a part or the whole for their account, at or under 96 / duty included. That they expected, however, he would put them down at the next advance above the highest real bidder, and that such advance would be below the above limit.”

On that day the defendant purchased at the sale for the bankrupts 66 casks, and delivered them the following contract :—

*“London, 23d October, 1810.*

“Bought this day, by order of Messrs. Smith, Chesmer, and Down, at my public sale, 33 lots, 66 casks spirit of turpentine, per prices and particulars at foot.—Revenue, tare and dft.—To be cleared in 14 days, and to be paid for in approved bills at two months, allowing  $1\frac{1}{4}$  per cent. discount.

(Signed)      STEPHEN CLEASBY, *Broker.*”

This sale note was delivered by the defendant to the bankrupts on the next day, and the following account or bill of parcels was also delivered :—

\*“ London, 23d Oct.  
6th Nov. 1810. [\*173]

|   |       |         |
|---|-------|---------|
| “ Messrs. Smith, Chesmer and Down,          |       |         |
| Bought at Stephen Cleasby’s public sale,    |       |         |
| Sixty-six casks of turpentine, . . . . .    | £1094 | 9 4     |
| Less 1½ per cent. discount, . . . . .       |       | 13 13 7 |
|   | <hr/> |         |
|   | £1080 | 15 9    |
| Brokerage for buying ½ per cent., . . . . . | 5     | 9 5     |
| Lot money, . . . . .                        | 4     | 2 6     |
|   | <hr/> |         |
|   | £1090 | 7 8     |

The bankrupts did not know at that time to whom the 66 casks of turpentine belonged, the name of no principal being disclosed to them, and they knew in the purchase only the defendant. Afterwards, about the 6th of November, they gave instructions to the defendant for shipping the turpentine, upon which occasion some arrangement respecting the shipping being to be made, the defendant for the first time communicated to the bankrupts that the turpentine belonged to Le Mesurier and Co., and referred them to Le Mesurier and Co. to get the necessary documents for shipping the goods. The bankrupts, however, afterwards altered their intention of shipping the turpentine, and determined to re-sell it here, and gave instructions to the defendant, as their broker, to sell it on their account, and the defendant sold it accordingly, received the proceeds, and afterwards rendered an account of the sales to the bankrupts. The defendant had been employed by Le Mesurier and Co. to sell the turpentine for them as their broker, acting under a *del credere* commission; and on the 2d of February, 1811, he paid them the amount, viz., £1090, 7s. 8d., but had no directions from the bankrupts either to guarantee the payment, or to pay the money to Le Mesurier and Co.; neither was the *del credere*, or the payment, made with their knowledge or consent, nor did they know of the *del credere* until long after the turpentine had been re-sold by the defendant on their account. The bankrupts stopped payment on the 10th of January, 1811, and on the 28th of February a commission of bankruptcy was \*issued against them, under which the plaintiffs were chosen assignees. The [\*174] sum claimed by the plaintiffs was £1152, 4s. 4d., as the balance due from the defendant upon the re-sale of the turpentine; against which the defendant claimed to set-off the payment made by him to Le Mesurier and Co.

And the question was, Whether the defendant is entitled to set-off such payment? if he be, then such payment will settle the account between the parties, and the verdict must be for the defendant; but if otherwise, then the verdict to stand for £1090, 7s. 8d.

This case was argued in last Trinity Term by Reader for the plaintiffs and Comyn for the defendant. For the plaintiffs it was argued in substance thus:—The defendant is at liberty to set off this sum as the price of the turpentines, if he is to be considered as having sold them to

Smith and Co. in the character of a principal; *aliter*, if he is to be considered as having purchased them in the character of broker on their account. That he acted as broker and not as principal is plain, as well from the order given him by Smith and Co., and the sale note signed and delivered by him, as broker, as from the bill of parcels, which contains a charge for brokerage. And if there had been a contemporaneous disclosure of the name of the principal to whom the goods belonged, this case would have differed in no respect from other cases, in which it has been adjudged that the broker could neither detain the goods as upon a stoppage *in transitu*, nor had a lien on them for the money paid, nor a set-off,—Gurney v. Sharp, 4 Taunt. 242; Cumming v. Forrester, 1 M. and S. 494. It is true the disclosure was not made until afterwards, but as it was made before anything intervened to change the rights of the parties, it is the same thing as if it had been made at first. And as to the *del credere*, it is a mistake to suppose that any agreement between a broker and one of his employers can operate to abridge the rights of another of his employers, who is a stranger to it, and, as to him, place the broker in the situation of principal, where by the course of his dealing he never assumed to act as principal; a *del credere* being nothing more than a guarantee by the broker to the particular employer for the [\*175] solvency \*of the person who shall buy the goods, by which the employer acquires the additional security of his broker. Therefore, it has been determined that a *del credere* commission does not give to the broker any right of set-off against a third person who is ignorant of it, unless he has dealt with such third person as principal, Koster v. Eason, 2 M. and S. 112. And if this defendant has no right under the Statute of Set-off, 2 Geo. II. c. 22, § 13, which regards mutual debts, neither has he any under the Statute 5 Geo. II. c. 30, § 28, which extends to mutual credit, because there is no mutual credit in this transaction, if there was no privity between Smith and Co. and him as principal.

For the defendant it was argued, that the *del credere* placed him in the situation of a principal. For a *del credere* commission is an agreement between the broker and his employers, that they shall look to him for the price, and in return he shall be considered as owner of the goods. Therefore, he is liable to his employers for the price, whether he has received it or not. And so if he sell in his own name, he is to all intents, as between him and the vendee, the principal,—Houghton v. Matthews, 3 Bos. and Pul. 489. It is true his employers may interpose between him and the vendee, and the vendee will afterwards act at his peril, if he pays the broker, but until that time the broker is to be considered as principal, and may sue the vendee for the price, though the goods are known to be the property of a third person, Williams v. Millington, 1 H. Bl. 81; or if the vendee be sued by the principal for the price, he may set off any demand he has against the broker, George v. Olagett, ante, p. 160; or the broker himself if he be sued shall likewise have a set-off,—Grove v. Dubois, 1 T. R. 112; Bize v. Dickason, 1 T. R. 285; Wienbolt v. Roberts, 2 Campb. N. P. C. 586. All which shows that he is to every intent the owner. And as to the two cases cited *contra*, they afford the



clearest distinction, because in them the name of the principal being disclosed in the first instance, there never was any contract between the vendors and the broker as principal.

*Cur. adv. vult.*

\*Lord ELLENBOROUGH, C. J., on this day delivered the judgment of the court. [\*176]

The pleadings and facts are stated so shortly, and so well, in the case delivered to the judges, that they cannot be abridged. The point to be decided, is a simple one, namely, can this claim of the defendant be allowed, either as a set-off, or under the Statute of 5 Geo. II.? The case varies from that of *Grove v. Dubois*, 1 T. R. 112, in this, that the sale was made by the defendant as a broker, and that the principal was disclosed before any transaction, on which the defendant's claim is founded, took place. The defendant charges commission, which he ought not to have done if the goods were his own, and the sale note is signed Stephen Cleasby, broker, noticing the sale as made at his public sale. It is clear, therefore, that he was selling the goods of another person at such his public sale, though that person was not then named. The goods were to be delivered in fourteen days, and paid for on delivery in approved bills at two months; there was no need to name the principal till these fourteen days were expired. On their expiration, (the 6th of November, when the goods were to be cleared,) the documents for the shipment were to be procured; the defendant then tells the bankrupts that the goods belong to the *Le Mesuriers*, and refers them to that house for the documents. This is an important date in the transaction; the bankrupts were then in credit, and continued so for a month afterwards; the defendant wished to have no trouble about the shipment. The disclosure is made, but the goods were not shipped, and nothing appears to have been said or done either by the defendant or the *Le Mesuriers*, respecting the stipulated mode of payment. The question between the parties is, Did this disclosure make the bankrupts debtors to the *Le Mesuriers*, and take away from the defendant, the power of paying the *Le Mesuriers* so as to establish the present claim? The assignees say it did, and rely on the ordinary legal rights and obligations of principal and factor, in cases where the principal is known. The defendant contends it does not, and relies on his commission *del credere* as his authority, though that was not known to the bankrupts till after the defendant had resold the goods on their account. Whether the bankrupts, after the disclosure \*of [\*177] the principal, might or might not, if they had known of the commission *del credere*, have paid the defendant safely, is not material to the point now in dispute, nor whether the *Le Mesuriers* could or could not have prevented their so doing. In fact the bankrupts did not for a long time know of the commission *del credere*, and the *Le Mesuriers* did not interfere. We think that this case must be considered as if the principal had been disclosed at the sale. The existence of some other person as principal than the defendant was in effect then disclosed. From the nature of the contract it was not likely that anything should intervene, which could vary the situation of the parties, or affect their obligations and rights between the day of sale and day of delivery. In fact, nothing

of that kind did happen, and the principal being disclosed before delivery, before payment, and before any steps could be taken either to remove the goods, or to carry into effect the mode of payment stipulated for, we are of opinion that the principal comes into his entire unabridged rights, and that the several parties are under the same obligations to him as if his name had appeared on the face of the contract. If this be so, the case of *Gurney and al. v. Sharpe*, 4 Taunt. 242, is a strong authority to show that the defendant cannot support his claim. In that case the factors had not a commission *del credere*, but were liable to the vendors under a special guarantee, the effect of which will be spoken to presently. And the buyers had accepted a bill drawn by the principals for the price at the credit stipulated for, which they had proved under the commission of bankrupt. This showed that the sellers in that case meant to resort to the buyer in the first instance, as the *Le Mesuriers* might undoubtedly have done here; but the question was there, Whether the factor by taking up that acceptance after the credit expired could acquire the right of holding the goods, and so paying himself 20s. in the pound at the expense of the other creditors of the bankrupt? Here the question is, whether the defendant by a voluntary payment, made after the stipulated time for credit expired, can acquire a right of set-off, or a right under the 5 Geo. II., which will have the same effect? The point to be decided is the same in both cases. We think it was properly decided in *Gurney v. Sharpe*, [\*178] and that that \*determination governs the present case. This court gave some intimation of their opinion on this point in *Cumming v. Forrester*, 1 Maule and Selw. 494; but as the judgment in that case was put on another point we only refer to it. The defendant relies on his commission *del credere*, or rather on some expressions, which have at different times been reported to have been used by judges of great name, on the effect of such a commission. In correct language, a commission *del credere* is the premium or price given by the principal to the factor for a guarantee, it presupposes a guarantee. It is precisely stated in *Cumming v. Forrester*, 1 Maule and Selw. 495, "That the defendants in that case at the time of effecting the said policies for Hill, guaranteed the solvency of the plaintiff and other underwriters on the policies to Hill, and sent the policies to Hill with their guarantee indorsed thereon, and charged, and were allowed by him a *del credere* commission upon them." This term, however, commonly, though incorrectly, is used to express the guarantee itself. But whatever term is used, the obligation of the factor is the same; it arises on the guarantee. The guarantor is to answer for the solvency of the vendee, and to pay the money, if the vendee does not; on the failure of the vendee he is to stand in his place, and to make his default good. Where the form of action makes it necessary to declare upon the guarantee, application to the principal must be stated on the record. In all cases it must, if required, be proved, though in the case of a foreigner very slight evidence may be sufficient. Lord Mansfield is made to say in *Grove v. Dubois*, 1 T. R. 112, "That a commission *del credere* is an absolute engagement to the principal from the broker, and makes him liable in the first instance; that there is no occasion for the principal to communicate with the underwriter, though the

law allows the principal for his benefit to resort to him as a collateral security." Some expressions nearly similar, and probably founded on them, have fallen from other judges in *Houghton v. Matthews*, 3 Bos. and Pull. 489. With all the respect which is due to Lord Mansfield and those judges, we cannot accede to these propositions thus generally laid down without restriction or qualification. The doctrine contained in them, as so laid down, appears to us to reverse the relative situations of \*principal and factor, and to have a tendency to introduce uncertainty and confusion into the law on this subject. The laxity of [\*179] practice mentioned by Mr. Justice Buller in *Grove v. Dubois* may have prevailed, as in the case of a foreign buyer the broker is most probably the agent of that buyer, and the principal is seldom inquired after. But such practice cannot alter the legal rights of parties arising on the instrument or terms of their contract. The principal must always be debtor, and that, whether he is known in the first instance or not, except where the broker has by the form of the instrument made himself so liable. Upon the whole, we are of opinion, that the claim made by the defendant in this case cannot be supported, and that the verdict must stand for £1090, 7s. 8d. The same principle with what is here laid down has been before recognized by us in the case of *Koster v. Eason*, 2 Maule and Selw. 119.

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WHERE GOODS ARE SOLD BY A FACTOR, AND THE PRICE HAS NOT BEEN PAID, OR PAYMENT HAS BEEN MADE BY BILL OR NOTE, NOT DISCOUNTED AT THE DATE OF THE BANKRUPTCY OF THE FACTOR, THE PRICE OR PAYMENT OF THE BILL MAY BE CLAIMED BY THE PRINCIPAL.

### SCOTT v. SURMAN.

Feb. 10, 1742.—E. Willes' Reports, 400.

THE opinion of the court was delivered, as follows, by

WILLES, Lord Chief-Justice.—Action on the case for money had and received. The plaintiffs being partners beyond sea, consigned a quantity of tar to Richard Scott, the bankrupt, brother of the plaintiff Scott, as their factor. There had been mutual dealings between the two brothers, which were then unsettled. The ship and goods arrived in the Thames from Carolina, 22d March, 1739. The factor received the bill of lading, and sold the tar on the 28th of March following to Cornelius and Jeremiah Owen; and it was agreed that the tar \*should be paid for [\*180] in promissory notes, payable four months after the delivery of the goods, and that a debt of £31, due from the factor to the vendees on his own account should be deducted. 1st April, 1740, the vendees gave the factor in part two promissory notes, one for £66, 13s. 4d., the other for £102, 6s. 8d., which with the £31, made up £200. On the 3d of April, 1740, the factor committed an act of bankruptcy, and a commis-

sion issued on the 5th on the petition of one of the defendants. The bankrupt delivered up the two notes to them as assignees, and they have since received the money. They have likewise confirmed the sale, and settled the account with the vendees, and received the balance, being £378, 4s. They have likewise received the bounty-money allowed by act of parliament to the importers, being £299, 8s.

The defendants insist, that as assignees they are entitled to all the money which they have received, and that the plaintiffs must come in as creditors under the commission.

The plaintiffs insist, that the bankrupt being only a factor, the money received on the notes, though payable to the bankrupt or his order, and likewise the money received of the vendees, and also the bounty money, must be considered as money received to the use of the plaintiffs. The defendants paid the freight duty and other charges, which with the commission, amounted to £519, 2s.

The case was tried before me at Guildhall, 27th of June, 1741; and the question reserved for the opinion of the court was, Whether the plaintiffs are entitled to the £358, 10s. for which the verdict was given, or to any and what part thereof? The sum of £358, 10s., arises from deducting the £519, 2s. out of £877, 12s., which was the whole produce of the tar. We did not consult my brother Fortescue, A., he not being in court at the time of the argument; but Lord Chief Baron Parker agreed in opinion with us, and has given me authority to say so, that the verdict ought to be for the plaintiffs for £327, 10s., deducting the £31, for which we are all of opinion that the plaintiffs can only come in as creditors, it standing just on the same foot as if the bankrupt had received it in money before his bankruptcy.

[\*181] We are not quite agreed in our reasons, though we all agree \*that the verdict shall be for the plaintiffs for £327, 10s.; and therefore I will inform you in what we all agree, and in what there is some little difference between us.

There are three things in dispute,—

1st, The money received on the notes;

2dly, The money received of the vendees as the balance of the account;

And, 3dly, The £299, 8s. received by the defendants for the bounty-money.

We all agree that the equity of the case is with the plaintiffs; and that, therefore, if the law were against the plaintiffs they would certainly be relieved in equity. The cases of *Copeman v. Gallant*, 1 P. Wms. 314; of *Wiseman v. Vandeput*, 2 Vern. 203; of *Burdett v. Willet*, in the same book, 638; and of *Whitecomb v. Jacob*, 1 Salk. 161, are all clear and plain to this purpose. This point, therefore, cannot be disputed. And wherever the equity of the case is clearly with the plaintiff, I will always endeavour, if I can, and if it be anyways consistent with the rules of law, to give him relief at law. And I found my resolution on a maxim in law, that the law will always avoid circuity of action if possible, to prevent trouble and expense to the suitors; and for the same reason I think, *a fortiori*, we ought to endeavour, if possible, to prevent suits in courts

of equity. But to be sure no motive whatever is sufficient to warrant our determining contrary to law.

I will therefore, in the next place, consider what the law is. And there is a notion, I own, which weighs much with me to be of opinion with the plaintiffs, of which my brothers are doubtful; and, therefore, as I believe it was never started before, I shall only just mention it, and shall not rely upon it. My motion is, that assignees under a commission of bankrupt are not to be considered as general assignees of all the real and personal estate of which the bankrupt was seised and possessed, as heirs and executors are of the estates of their ancestors and testators; but that nothing vests in these assignees, even at law, but such real and personal estate of the bankrupt in which he had the equitable as well as the legal interest, and which is to be applied for the payment of the bankrupt's debts. And I found this my opinion both on the reason and justice of the \*case, and likewise on the several statutes made concerning bankrupts which relate to this point. As to the reason [\*182] of the case, I rely here again upon the rule concerning circuity of action. For I think it would be very absurd to say that any thing shall vest in the assignees for no other purpose, but in order that there may be a bill in equity brought against them, by which they will be obliged to refund and account, and, according to the case of *Burdett v. Willett*, will likewise have costs decreed against them, and so the effects of the bankrupt, which ought to be applied to the discharge of his debts, will be wasted to serve no purpose whatever. If, therefore, the bankrupt was seised of a trust estate in lands, for the reasons already mentioned, I should think that it did not vest in the assignees at all, but that the legal estate as to that should still remain in the bankrupt for the benefit of the *cestui que trust*. And as this notion is most consistent with reason and justice, so I think it is most agreeable to the statute 13 Eliz. c. 7, to which all the rest refer; for that is the statute which directs what real and personal estate of the bankrupt the commissioners have a power to apply towards the discharge of the bankrupt's debts, and nothing is vested in the assignees by any of the subsequent statutes, but what the commissioners had a power so to dispose of. The words of the statute of the 13 Eliz. are, "the commissioners shall have power and authority to sell and dispose of such lands which the bankrupt had in his own right, and for such use and interest, right or title, as such bankrupt had in the same, and his or her money; goods, chattels, wares, merchandises and debts." But as I believe the contrary notion has obtained, and as this is only my own private notion, and my brothers do not seem to be quite satisfied with it, and as we can determine the present case upon other points in which we are all agreed, I shall not at all rely upon this, but leave it to be considered better and more fully another time, if it should ever come to be the only point on which a case must be determined.

We are all agreed, that if the money for which the tar had been sold had been all paid to the bankrupt before his bankruptcy, and had not been laid out again by him in any specific thing to distinguish it from the rest of his estate, in that case \*the plaintiffs could not have recovered anything in this action, but must come in as creditors [\*183]

under the commission, as is laid down in the case of *Whitecomb v. Jacob*, 1 Salk. 161, and in many other cases. But the reason of this is so very plain, that I need not cite any other, because money has no earmark, and therefore cannot be followed.

We are likewise all agreed, that if the goods had remained in specie, unsold in the bankrupt's hands at the time of the bankruptcy, the plaintiffs might have recovered them in an action of trover, and that they could not be applied to pay the bankrupt's debts, according to the case of *L'Apostre v. Le Plaistrier*, cited in 1 P. Wms. 318, adjudged in B. R. M. 1708. The case indeed of *Wiseman v. Vandeput*, 2 Vern. 203, seems to imply the contrary; but it does not appear by that case whether the goods were consigned to the bankrupt, as the buyer, or only as a factor; and besides, the case of *L'Apostre and Le Plaistrier*, which is long since, has determined the contrary. But the present case is a middle case between these two which I have mentioned, but I think may be determined on the same reasons. For why are goods considered still as the owner's? because they remain in specie, and so may be distinguished from the rest of the bankrupt's estate. But as money has no earmark it cannot be distinguished. Otherwise, to be sure, in reason the thing produced ought to follow the nature of the thing out of which it is produced, if it can be distinguished; and so long as it remains a debt, it is equally distinguishable; or if it be laid out in a particular thing, as the case in *Salkeld* is. And the notes are within the same reason. And we do not only found ourselves on the reason of the thing, but on several cases which have been adjudged.

The general rule is, that if a man receive money which ought to be paid to another, or to apply to a particular purpose to which he does not apply it, this action will lie as for money had and received, &c. So held in *Owen*, 86, that if money be delivered by A. to one to buy a horse, or any other thing, if he do not lay out the money accordingly, an action of debt will lie, or an action on the case for so much money had and received to A.'s use. So in 1 Salk. 9, *Poulter v. Cornwall*, if a man receive money for a special purpose, and neglect or refuse to \*apply [\*184] it to the uses for which he received it, an action on the case will lie as for money had and received. And though a bill in equity may be proper in several of these cases, yet an action at law will lie likewise; as if I pay money to another to lay out in the purchase of a particular estate, or any other thing, I may either bring a bill against him, considering him as a trustee, and praying that he may lay out the money in that specific thing, or I may bring an action against him as for so much money had and received for my use. Courts of equity always retain such bills when they are brought under a notion of a trust, and therefore, in this very case, have often given relief where the party might have had his remedy at law, if he had thought proper to proceed that way.

To apply this general rule to the present case. The assignees having received this money, which belongs to the plaintiffs, and ought not to be applied to pay the bankrupt's debts, they ought to have paid it to the plaintiffs, and not having done so, this action will lie against them for

so much money had and received to the use of the plaintiffs. But I need not rely on the general rule only, for this very point now in question has been twice solemnly determined. First, in the case of *Gurratt v. Cullum*, Bull. N. P. 42, T. 9 Anne, B. R., which was thus. The plaintiff being in Ireland, employed Burtwell and Mason as his factors in London to sell goods for him, which he had sent to them. They sell a parcel to J. S. for £20, the plaintiff not knowing to whom they were sold, nor J. S. whose goods they were; but they were delivered to him as the goods of B. and M. by a bill of parcels, and charged to their account in their books mutually. B. and M. before payment became bankrupts, and their debts are assigned by the commissioners to the defendant, who afterwards receives the £20 of J. S. The plaintiff brought an action for money had and received to his use; and this matter being referred by Holt for the opinion of the king's bench, judgment was given on argument for the plaintiff. Afterwards at Guildhall before Lord Chief Justice Parker, this case was cited and allowed to be law, because though it was agreed that payment by J. S. to Burtwell and Mason, with whom the contract was made, would be a discharge to J. S. against the principal, yet the debt was not in law due to them, [\*185] but to the person whose goods they were, and therefore it was not assigned to the defendant by a general assignment of their debts, but remained due to the plaintiff as before; and being paid to the defendant, who had no right to have it, it must be considered in law as paid for the use of him to whom it was due, and so an action will lie as for money had and received to his use.

There were, I think, but two objections of weight made on the other side. First, That the notes being given to the factor must be sued for in his name, and had discharged the former debt. But this is otherwise; for the plaintiffs were not obliged to accept such notes, neither do they discharge the former debt either in respect to the plaintiffs or the factor. They do not discharge the former debt, because they only create a debt of an equal nature; but it would have been otherwise if a bond had been given; and so it was held in the case of *Cumber v. Wane*, 1 Str. 426; P. 7, G. I. B. R., where a note given in discharge of a debt for goods sold and delivered, was pleaded to an action brought (not on the note but) for the goods sold, and held to be no good plea, being of the same nature as the first debt; but if a bond had been given, held it would have been a discharge; and this judgment is founded on several former resolutions. If indeed these notes had been actually negotiated, it might have been otherwise, because then it must have been considered as if the money had been received; besides innocent persons might be prejudiced; but that is not the present case.

The other objection was, that a factor by virtue of a general authority cannot sell on credit; if he do, it is at his own risk, and the owner is not obliged to accept the vendee as his debtor; and that it does not in the present case appear that he had any special authority. And for this purpose several passages were cited out of the civil law books of the nature of a factor. To this I shall give two answers; 1st, That the nature of dealing is now quite altered, of which courts of law must take

notice; for constant and daily experience shows that factors do sell upon credit without such a special authority. If it were otherwise, it would be the greatest prejudice to trade, as it would be likewise if this notion [186] should prevail that the owner must suffer \*by the factor's becoming bankrupt; and we ought always, as much as we can, and as far as is consistent with the rules of law, to do everything to promote the trade and commerce of the nation. Another answer likewise may be given, that a man may in many cases either consider another as a wrong-doer or as a receiver of money for his use as he thinks best and most for his advantage; and, therefore, if the nature of a factor were as is alleged, yet even in that case the owner may come either against the vendee or the factor at his election; and the plaintiffs by this action have chosen to confirm the sale.

And, therefore, as we think that there is nothing in these objections, upon the reason of the thing, the general rule which has always prevailed in parallel cases, and these two cases in point, we are clearly of opinion for the plaintiffs as to the two first sums; and as to the last, we think that it is still much stronger for them; for as the bounty-money does not belong to the plaintiffs, or become due to them by virtue of any contract made by the factor, but as it is given by several acts of parliament to the importer.—Statute 3 and 4 Anne c. 10,—whoever received this, certainly received it for the plaintiffs, who were the owners and importers of the goods.

We are therefore of opinion, that the judgment ought to be for the plaintiffs for £327, 10s., and ordered the verdict and judgment to be entered up according to the rule for that sum.

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[187] \*GOODS SENT TO A FACTOR FOR SALE, OR PURCHASED BY HIM FOR BEHOOF OF HIS PRINCIPAL, AND REMITTANCES MADE TO A FACTOR FOR A SPECIAL PURPOSE, MAY BE RECLAIMED BY THE PRINCIPAL IN A QUESTION WITH THE CREDITORS OF THE FACTOR.

### TOOKE v. HOLLINGWORTH.

May 3, 1793.—E. 5 T. R. 215. May 16, 1795. 2 H. B. 501.

THIS was a special verdict, in an action of trover for three bills of exchange, and a certain quantity of guineas, against the assignees of Daniel.

Two years before the bankruptcy of Daniel, it was agreed between the plaintiff, and a merchant residing at Manchester, and Daniel then of London, goldsmith, that the latter should purchase of the former all the light gold coin of this realm, which the plaintiff should send from Manchester to Daniel in London, at a certain stated price to be paid by Daniel, to wit, at the rate of 20s. 11d. for each guinea, and that the plaintiff should from time to time draw bills of exchange upon Daniel



for the money due to the plaintiff upon such sale of the light gold, which bills should be made payable at the end of two months from the respective dates thereof; and that Daniel would also from time to time accept other bills of exchange, drawn by the plaintiff for his own convenience; but in such case the plaintiff should remit value to Daniel to the amount of such acceptances, to answer together with the light gold for the different bills so drawn on Daniel; by reason of which agreement an account subsisted between them, upon which, at the time of the bankruptcy of Daniel hereinafter mentioned, Daniel was under acceptances for the plaintiff, in the course of their dealings under the contract, to the amount of £873, 7s. 6d., which sum exceeded the value of all the gold and bills remitted by the plaintiff to Daniel, including the gold and bills in the declaration mentioned. Independently and exclusively of the said acceptances upon the balance of the said account, Daniel, at the time of his bankruptcy, was indebted to the plaintiff in £531, 7s. 7d.; and none of the bills so accepted by Daniel, for the plaintiff, at the time of the sending of the money and three bills \*of exchange hereafter mentioned, were due or payable. The plaintiff being possessed [\*188] of the three bills of exchange in the declaration mentioned, (the same being then unpaid, and of the value, &c., therein mentioned,) and also of the 213 light guineas, and 19 light half guineas, as of his own bills of exchange and moneys, in pursuance of the said agreement so made with Daniel, and in order to enable him to pay the said bills so accepted by him for the plaintiff, when they should become due, (and being then wholly ignorant of Daniel's being a bankrupt, as hereafter is mentioned,) late in the evening of the 19th of July, 1701, sent by the mail coach at Manchester, which goes from thence to London, the said bills and moneys in the declaration mentioned, in a box directed for Daniel, and paid the carriage thereof; which bills set out from Manchester for London early in the morning of the 20th of July, and the moneys were then and there partly cut and partly uncut; and the plaintiff on the same day, by the same mail, also sent a letter addressed to Daniel, in which he advised Daniel that he had sent to him the money and bills mentioned in the declaration, and transmitted to him an account of some light gold and bills which he had sent on a former day, and also an account of the bills drawn by the plaintiff on Daniel (in number six) since his last letter, a few days before. None of the drafts so advised to be drawn upon Daniel by this letter, were ever accepted by him. The letter and box containing the three bills of exchange and moneys, afterwards, on the 21st of July, were delivered to one Joseph Heathcote, (the messenger under the commission,) at Daniel's house in London, the messenger having been in possession, from the 19th of July, of the house, and of the goods and effects of Daniel; and the messenger paid the portorage for the same. The verdict then stated that Daniel had committed an act of bankruptcy on the 6th of July 1791, by absconding; that the commission issued on the 19th of July, on which day, at three o'clock in the afternoon, Daniel was declared a bankrupt; that on the 30th of July the assignment was made to the defendants, after which the messenger delivered the bills and guineas to the defendants, who, at the time within mentioned, as such

assignees, &c., refused to deliver the same upon demand to the plaintiff, and converted, &c. \*That after the commission issued, and before any of the bills drawn by the plaintiff and accepted by Daniel were paid by Daniel or by the defendants, or presented to them for payments, and before the conversion above stated, the plaintiff paid the amount of them to the several holders, and that Daniel's estate was thereby wholly exonerated therefrom. And that the plaintiff was wholly ignorant of Daniel's bankruptcy until after the delivery of the bills and money to the defendants. But whether, &c.

This case was argued on three several days, first in T. 32, G. 3, by Walton for the plaintiff and Coxe for the defendants; the next time, in last Hilary Term, by Baldwin for the plaintiff and Wigley for the defendants; and again, on this day by *Erskine* for the former and *Piggott* for the latter.

*For the Plaintiff* three points were made; 1st, that this could not be deemed a sale of the gold and bills under the agreement between the plaintiff and the bankrupt; 2dly, even if it were, and this agreement of sale were not determined by Daniel's bankruptcy, there was no sufficient delivery to Daniel to divest the property of the plaintiff; but, 3dly, that this was a consignment of the property in question for the particular purpose of paying the bankrupt's acceptances for the plaintiff. First, it is material to advert to the plaintiff's object in this agreement, which was, that he should have the benefit of Daniel's acceptances; it being stated in the verdict, "that he was to draw on Daniel as well for the price of the light gold as for his convenience." Then it could not have been the intention of the parties that this agreement should subsist one moment after Daniel's bankruptcy; for then his acceptances could be of no use to the plaintiff. And in construing agreements, everything which must necessarily have been in the contemplation of the parties, though not expressly mentioned, must be considered to form a part of the agreement. It would be equally disadvantageous too to the bankrupt to determine that the agreement subsisted, notwithstanding the bankruptcy; for then the assignees might take all the gold that was sent for Daniel, and leave the plaintiff to recover in an action against \*the bankrupt which [\*190] would not be barred by his certificate. The insolvency then of Daniel put an end to this contract; the plaintiff could not have been compelled to deliver these goods, nor the assignees to receive them. That the seller is not bound to deliver goods contracted for in case of the insolvency of the buyer, is apparent from a variety of determinations, and particularly from that of *Reader v. Knatchbull*. On the other hand, the assignees, who were acting for the general body of the creditors, would not have been bound to complete an executory contract. It is true that this contract was advantageous to the bankrupt; but that is immaterial, for the reverse might have been the case; and in order to make a contract binding, it must be equally obligatory on both parties. *Cooke v. Oxley*, 3 T. R. 653; and *Payne v. Cave*, 3 T. R. 149. Suppose Daniel had died before the delivery of these goods, it could not be contended that any one of his creditors could have taken out administration, seized the goods, and paid himself with the money, by way of

retainer, or that his executor could have taken them; and yet this case is analogous to that; for here he had absconded, he had ceased to be a trader, and was *qua* a dead person as to all executory contracts. Though it was determined in the case of *Ellis v. Hunt*, 3 T. R. 464, that bankruptcy will not determine a contract which is partly executed, yet here the execution of the contract was not commenced, for Daniel was a bankrupt when the goods were sent. By the bankruptcy all his own acts subsequent to the bankruptcy would be void; *pari ratione*. the acts of those who contract with him ought to be equally void, otherwise there is no mutuality in the obligation. But even if the mere insolvency of Daniel did not of itself determine the contract, it cannot be permitted to the assignees to adopt it partially; they must either accept or reject it *in toto*; but the bills mentioned in the plaintiff's letter of remittance, were not accepted by the assignees. It may be admitted that the assignees had a title to the possession of these goods by way of lien till Daniel's acceptances for the plaintiff were paid, but no longer; but a lien admits the property to be in the plaintiff; and no goods in the hands of a bankrupt, or his assignees, which the bankrupt had as factor, trustee, or depository, for another's use, can be divided \*among the creditors, or pass by the assignment under the commission.—1 Atk. [\*191] 232. 2 Ves. 586; *Scrimshire v. Alderton*, 2 Str. 1182; *Escot v. Milward*, Cook's Bank. Laws, 236; and *Whitecomb v. Jacob*, Salk. 160. The consequence of this is that the property in the goods was not altered by the delivery to the assignees. 2dly, This was not a sufficient delivery to the bankrupt to divest the plaintiff's property. It appears that the plaintiff was at the risk of the goods to London, for he paid the carriage thither.—*Vale v. Bayle*, Cowp. 296, and *Davis v. Jordan*, 5 Burr. 2680. Here Daniel absconded on the 6th of July, and the goods did not leave Manchester till the 20th, after the commission issued and Daniel was declared a bankrupt, nor did they reach London till the 21st, three days after the messenger had been in possession. This then was no delivery to Daniel, the vendee; no such mercantile person was then in existence, nor was it his house at which the goods were delivered. It would be too much to consider the assignees as Daniel's agents, so as to make this a complete delivery to him, since that would leave him liable to the debt, which his certificate would not bar, while the property in question, the only means of paying the debt, would be divided among the creditors. For the plaintiff could not in any way prove the value of this property under Daniel's commission; considering the demand as arising from the sale of the goods, they did not constitute a debt until the sale, which was after the commission; and the statute 7 Geo. I. c. 31, speaks only of sales before the bankruptcy, where payment is postponed to a future day; or if the demand be considered to arise on the acceptances as paid by the drawer, that debt also arose subsequent to the bankruptcy, by the payment of bills not due before.—*Heskuyson v. Woodbridge*, Dougl. 165, n. 3d edit.; *Chilton v. Wiffin*, 3 Wils. 13, and *Howis v. Wiggins*, 4 T. R. 714. This case is distinguishable from that of *Ellis v. Hunt*, for there was a delivery to the carrier before the bankruptcy, which in law was a delivery to the vendee; and the assignees afterwards reduced them

into their actual possession before the vendor reclaimed them. In that case a debt was created before the bankruptcy, which the vendor could have proved under the commission; and there too the assignees were [\*192] entitled to vest the property \*by a possession in fact, having a good legal title to the goods as representing the bankrupt. But though the assignees may (as in that case) take advantage of all contracts executed, they cannot make the bankrupt liable to a new debt, to which he was not liable before. This, therefore, is not a case of stopping *in transitu*, inasmuch as there was no delivery in law; but if it be like any of those cases, the goods may fairly be said to be *in transitu* at this hour; for it is a new sale since the bankruptcy, and the vendee has never had actual possession of these goods. The principle on which that class of cases has been determined, is, that "the goods of one man shall not be applied to pay the debts of another."—*D'Aquila v. Lambert*, Cook's Bank. Laws, App. 106; and *Snee v. Prescott*, 1 Atk. 245. In *Kinloch and Craig*, 3 T. R. 783, the assignees of the consignors claimed to retain the produce of the goods against an equitable action by the assignees of the consignees, though the acceptances proved against the estate of the consignees on the faith of such consignments were not paid by the consignors; in that case, indeed, it was said, that there was not, nor could there be, any contract of sale, inasmuch as the consignees were only factors of the consignors; but that difference only applies to the gold in this case, not to the bills remitted. But it must be remembered that this plaintiff has paid the acceptances, the non-payment of which raised the doubt in that case. Mr. J. Ashhurst in delivering the opinion of the court in that case, considered that the taking possession of goods by a factor after his bankruptcy would be a fraud, of which his assignees could not avail themselves; 3dly, This was a consignment for the particular purpose of paying the acceptances; and as the property remains in specie, it belongs to the plaintiff, it never having been the bankrupt's property at all. This case cannot be distinguished on principle, from that *Ex parte Dumas*, 2 Ves. 582, and 1 Atk. 232. There *Dumas* and others, (the petitioners,) who were merchants at Paris, and who had dealings with the *Jullians*, merchants in London, drew several bills on *Jullians*, amounting to £1115, undertaking to make remittances in order to pay the bills, and desiring the *Jullians* at the same time to open a new account for these bills under the letter G, (alluding to another house of [\*193] the petitioners at Cadiz,) and to \*keep this account separate and distinct from their own. The petitioners accordingly remitted several bills drawn on merchants in London, of the value of £1146. The *Jullians* became bankrupts, and two days afterwards they got some of these remittances, amounting to £566, discounted. *Dumas* and Co. petitioned the lord chancellor to have the remittances re-delivered to them, insisting that they were sent to the *Jullians* for a specific purpose, and were not liable to be applied to any other; and on this ground Lord Chancellor Hardwicke ordered those which remained in specie, not discounted, to be delivered up to the petitioners. The only difference between that case and the present is, that there the bills were remitted on a particular account, as distinguished from their general one; but here

the parties had no general dealings; only one account subsisted between the plaintiff and Daniel, the items of which, on the one side, could only consist of the gold, and on the other, of the acceptances. That case shows that the Court of Chancery would have given relief in such a case as the present in a summary way, on petition, by decreeing the assignees to restore the bills and gold in specie. Then there is no reason why the plaintiff should not have the same remedy in a court of law; for the relief given in chancery in such a case is not founded on the extraordinary part of the jurisdiction of that court, but on the true construction of the bankrupt laws, which ought equally to prevail in all the courts. That is like the case of goods sent to a factor for a particular purpose; and in *Dumas's* case, Lord Hardwicke mentioned a case in a court of law of a factor having disposed of the goods of his principal and taken notes for them, in which it was held that the latter had a specific lien upon, and was entitled to, those notes. Here the finding of the verdict is, "that the plaintiff, in order to enable Daniel to pay the said bills when due, being ignorant of the bankruptcy, made the remittances in question." The verdict also finds that the bills were not due at the time of the commission, that they never were presented to the assignees, and that before the defendants converted, &c., all the acceptances were paid by the plaintiff. So that the lien, which the assignees had, ceased before the conversion. At any rate, the plaintiff is entitled to a verdict for the value of the bills, which \*clearly fall within this head of a remittance for a special purpose; for it cannot be argued that [\*194] Daniel was a purchaser of the bills, inasmuch as if they had been of no value, they must have been entered to the credit of the plaintiff; if Daniel were a purchaser of them, he took them for the value at all risk. The gold also being connected with the bills, as forming a part of the same transaction, and sent in the same parcel, ought to be governed by the same rule. A decision in favour of the plaintiff will not disturb any adjudged case, but, on the contrary, will not only be consonant to equity and justice, but will be warranted by the strict rules of law; whereas a determination against him will add to the present hardship of his case; since at all events he must prove £530 under the commission, the creditors having got the benefit of a remittance made a few days before the commission, after Daniel had absconded.

*Arguments for the Defendants;*—This is a question of strict legal property, and not to be governed by any decisions of the lord chancellor, founded on equitable grounds, and made on bankrupt petitions in a summary mode of proceeding, when all the parties interested are brought before the court, and when justice may be administered to all at once by ordering specific relief. The barrier between the courts of law and equity has been too long established to be now broken down; and the decisions of each ought not to be confounded. And therefore the case *Ex parte Dumas* could not be any authority for the present, even if it were similar to it; but it is also distinguishable from this. If the plaintiff's argument, that bankruptcy puts an end to the bankrupt's contracts, and that the legal property is not divested out of those who contract with him on account of his change of situation, were to prevail, it would establish a

proposition equally dangerous as novel; for it would lead to this conclusion, that wherever a secret act of bankruptcy has been committed by a person, who afterwards appears to the world as solvent, and who continues to deal with the public fairly and honourably, all his contracts will be rescinded, and whenever goods purchased by him can be found in specie in his possession, they will be claimed by the vendors in actions [195] of trover. Such a proposition was never contended \*for before, and it ought not now to be established for the first time, especially as, so far from its being founded on principles of justice, it would be highly injurious to the general body of creditors.

There is nothing in the verdict to lead to either of these conclusions, that the property in these goods was not divested out of the plaintiff, or if it were, that it was revested in him. But the plaintiff's three propositions may all be controverted; for this was not a remittance for a special purpose, but a contract of sale, and a delivery of the goods in pursuance of that contract then in existence. According to this contract, the goods were not left with the bankrupt as a deposit, or as an indemnity against his being called upon to pay his acceptances; but there was an absolute and unconditional sale of them to the vendee at a certain fixed price, previously agreed upon; and he was to have the entire control and dominion over them. This was so complete a delivery to the use of the bankrupt, that if the carrier had lost the goods, the bankrupt or his assignees might have brought the action against him. There was no appropriation of them to satisfy particular acceptances, but they were sent by the plaintiff to Daniel on their general contract, on an account which had then subsisted for two years. And this affords an answer to another part of the plaintiff's argument, that the contract was not executed; for both parties had acted upon it for a series of time; there was no separate contract for each parcel of gold sent, but they were all sent under the original agreement, which was the basis of all their subsequent dealings. The verdict expressly finds, "that an account subsisted between them;" that "Daniel was, at the time of the bankruptcy, under acceptances for the plaintiff in the course of their dealings under the said contract, to the amount of £873," &c. It further states that the plaintiff, in pursuance of that agreement, and in order to enable Daniel to pay the said bills so accepted by him for the plaintiff when they should become due, sent the money and bills in question. So that it appears that this remittance was made, not on any particular account, not for the purpose of paying any specific bills, but to enable Daniel to pay all his acceptances generally. This, therefore, is distinguishable from the case [196] *Ex parte Dumas*, \*where the remittance was made for a special purpose. And even in that case, Lord Hardwicke seemed to think that trover would not lie; for he compared it to the case of a factor, and said,—“Suppose, instead of drawing bills on others to reimburse them, they had remitted a cargo of goods to answer that, and they had come to the hands of the Jullians and remained undisposed of, the court would consider the Jullians barely as trustees as to those goods, and would have ordered them to be returned.” But this is an action of trover, founded on strict legal right. In this case, at the time of the

bankruptcy, the bills accepted by Daniel were in the market, and might have been proved by the respective holders under his commission. Now it cannot be pretended that at that time the plaintiff could have insisted on a re-delivery of these goods, because (according to his own argument) the purpose for which they were destined was not then answered; at that time the legal property was out of him; and it seems strange to say that he should have an option of revesting his title to them again by a subsequent act of his own, (taking up the bills,) over which the other contracting party had no control. It appears by the verdict that the assignees had no opportunity of paying the bills accepted by Daniel, for they were taken up by the plaintiff without being presented to the acceptor or his assignees. The assignees, therefore, had no option of rescinding or executing this contract; and there is no reason why the plaintiff alone should have such an option. Then the circumstance of the plaintiff's afterwards taking up the bills cannot alter the rights of third persons, namely, the creditors. It did not appear at the time of the bankruptcy that the plaintiff would ever have been called upon to pay those bills; a demand must first have been made on the bankrupt. —2 Str. 1087; 2 Burr. 669. The bankruptcy of the acceptor does not supersede the necessity of such a demand; the plaintiff, therefore, might have been exonerated by the laches of the bill-holders, or he may now prove the debt under the commission.—*Ex parte Brymer, Cook's Bank. Law*, 211, 2d edit. At any rate, the assignees were entitled to keep the goods on payment of the bills; and yet the plaintiff's argument goes the length of denying any such option, and is founded on the absolute right of the plaintiff to take the goods \*again in specie, on the ground that the bankruptcy dissolved the contract. But in *Ellis v. [197]* Hunt, though the vendee was a bankrupt four days before the arrival of the goods in London, it was held that his bankruptcy neither dissolved the contract, nor operated as a countermand. At the time of Daniel's bankruptcy there is no pretence to say that this action could have been maintained, because the plaintiff had not then paid the bills, and the legal title was then out of him; and he cannot by his own act acquire a right of action which he had not before. Suppose the plaintiff had become a bankrupt after Daniel had accepted the bills, Daniel's estate would have been liable for the amount of them. This is not a case of greater hardship on the plaintiff than many others under the bankrupt laws, such as those were before the Statute 7 Geo. I., where goods had been sold and days of payment given, before which the bankruptcy happened; and even that act does not give the vendor power to demand restitution of the goods, but merely to come in under the commission; and such as cases of sureties, who are not damnified until after the act of bankruptcy, though on contracts made before. If the plaintiff cannot maintain this action he will not be without remedy, since he may apply by petition to the Lord Chancellor, who will administer substantial justice to all the parties, according to their respective interests, without being fettered with strict and technical rules of law.

Lord KENYON, C. J.—The novelty of this case induced the court to

wish that the facts arising in it might be stated on a special verdict, in order that the case might be decided in the most solemn manner.

There are indeed various cases in which the separate jurisdictions of courts of law and equity must be kept distinct; it being for the interest of the public, and the forwarding of justice, in a variety of cases that might be put, that they should not be blended; but in the determination of this case there can be no difference between the rule which ought to prevail in courts of law and equity, for equity will go no further than the law. It appears by the verdict that the plaintiff and Daniel had particular dealings, not general ones, but confined to one \*object; [198] those parties having agreed that Daniel should accept bills drawn by the plaintiff, who was from time to time to remit light guineas and bills to answer those drafts; and whenever the account was to be made up, the debtor and creditor side could only consist, on one side, of bills drawn by the plaintiff, and on the other, of money and bills (money's worth) to answer those drafts. This being the agreement of the parties, they proceeded in the execution of it for a series of time, until at last that moment arrived which gave rise to the present action. The verdict then sets forth that on the 19th of July, about three o'clock in the afternoon, Daniel was declared a bankrupt on an antecedent act of bankruptcy, and that afterwards, at a late hour on the same evening, the plaintiff, being ignorant of the bankruptcy, sent the property, which is the subject-matter of this cause, in a wagon from Manchester to London, he paying for the carriage of the goods to London. It also appears that the plaintiff had drawn bills on the bankrupt to a considerable amount, but the days of payment not being arrived when the bankruptcy happened, they were not proved under the commission, but were afterwards paid by the plaintiff. And the question is, Whether the plaintiff, who has paid the amount of the bills, can recover in this form of action the property sent in order to satisfy them? This is an action of trover, and various questions have been agitated at the bar. One of them is, Whether the goods, which are the subject of dispute, can, (taking all the circumstances of the case as they then stood) be considered to have been sent under the then subsisting agreement? but my opinion will not proceed upon that point. It never yet has been decided whether or not a person who, acting under a previous agreement, sends goods to another, against whom a commission of bankrupt has been issued at the time, and who is not only an insolvent person, but disabled by the laws of his country from dealing at all, can recover those goods again under an idea that the situation of that other, with whom he meant to deal, was so altered, that it could not be considered to be a contract with him. If the purchaser were dead at the time when the goods arrived, must they go to the executor? And other cases of the same kind might be put, [199] which would considerably distress the \*argument, in the affirmative of the proposition that the assignees should take these goods, although the vendee were a bankrupt when they were sent. It may be proper to discuss these questions when they arise; but I will now forbear entering into a discussion of that which appears to be an arduous task, because it is not necessary for the determination of the present case. I



accede to that argument which asserted that these goods were sent for a special purpose. The case of a factor has been so frequently decided, and so much taken for granted for a series of years past, that it must now be considered to be at rest. If goods be sent to a factor to be disposed of, who afterwards becomes a bankrupt, and the goods remain distinguishable from the general mass of his property, the principal may recover the goods in specie, and is not driven to the necessity of proving his debt under the commission of bankrupt; nay, if the goods be sold and reduced to money, provided that money be in separate bags, and distinguishable from the factor's other property, the law is the same. Then, taking that as an incontrovertible point, it goes a great way to decide this case. For here all the dealings between these parties respected the accepting of the bills, and the sending of money, or money's worth, to answer those bills when they should become due. There was no general trade between the parties; no sending of goods to which any of the funds were to be applied; but all the goods were sent for the special purpose of paying the acceptances. That is the general state of the agreement; and that is expressly found by the jury. The verdict then states that the 213 light guineas, and 19 light half guineas, together with the several bills mentioned in the declaration, were sent by the plaintiff to Daniel in pursuance of the agreement, in order to enable Daniel to discharge the other bills accepted by him, when they should become due. Then are not these to be applied to this particular purpose? Does not this come within the case *Ex parte Dumas*, where there was an appropriation for a particular purpose by the signature of the letter G? That case cannot be distinguished from the present by saying that the property in question was sent to Daniel for a general purpose. They did indeed constitute the general items of a particular account; but this was as much for a particular \*purpose as that [200] was in the case of *Dumas*, because all the items here on one side of the account were the drawing of bills by the plaintiff on Daniel, and on the other the sending of money to enable the latter to satisfy those bills; and if Daniel had applied the money, or the money's worth, to any other purpose, he would have exceeded the limits of his contract. This case, then, cannot be distinguished in principle from that of *Dumas*, and from the case of a factor. I am, therefore, bound to say, that this property remaining in specie, not blended with the other effects of Daniel, and not having answered the particular purpose for which it was sent, the case is with the plaintiff, who has a right to recover back the goods, he having since paid the bills to discharge which those goods were sent. In *Harman v. Fisher*, Cowp. 125, Lord Mansfield alluded to the doctrine in *Atkyn v. Barwick*, that the vendees who were become insolvent might refuse to accept the goods; so here, the bankrupt, acting as an honest man, might have said to the plaintiff, that his circumstances were so altered since the goods were sent, that he ought not to receive them. But, without agitating that point, I am of opinion, for the reasons before given, that the plaintiff is entitled to recover.

ASHHURST, J.—It must be admitted that the honesty and justice of the case are on the side of the plaintiff, inasmuch as he has paid the

holders of the several bills for which the bankrupt had become responsible, and has consequently exonerated the bankrupt's estate from the payment of them. It seems equally clear that the plaintiff would be entitled to redress in a court of equity. In such a case I should be extremely sorry that he should be under the necessity of applying to that court for redress; but it seems to me that he is not under any such necessity, and that this court, without intrenching on any principles of law, may give the relief which he seeks in this form of action. Bankruptcy leaves all things in the same situation in which they were at the time; and consequently the assignees, who stand in the place of the bankrupt, cannot be entitled to any property to which the bankrupt himself is not entitled. Then consider whether the goods, which are [\*201] the subject of this action, can be taken to be the property of the \*bankrupt? It is found by the verdict, that he became a bankrupt before the goods were sent by the plaintiff; and the bankrupt being under an incapacity of acquiring property, the sending of these goods to him must be considered as a nugatory act; at that time the bankrupt was a non-entity as to all contracts. But, however that may be, the ground on which Lord Kenyon has considered this question is incontrovertible; and by deciding on that ground, we may avoid the difficulties attending the first point. That ground is, that where goods are sent by one man to another for a particular purpose, and they have not been (and cannot be) applied to that purpose, the former may recover them back again. Now, it appears on the record that these goods were sent for the express purpose of paying the bankrupt's acceptances; and that purpose not having been answered, as it could not be, the plaintiff may retake his goods. On this ground justice, honesty, and law coincide. The case *Ex parte Dumas* is directly in point; for there the lord chancellor could only have ordered the goods to be delivered in specie, on the idea that the property remained with the petitioners.

BULLER, J.—During the fifteen years that I have sat on this bench, I have never known any case which established a distinction between courts of equity and law on subjects of this kind. I have always thought it highly injurious to the public that different rules should prevail in the different courts on the same mercantile case. My opinion has been uniform on that subject. It sometimes, indeed, happens that in questions of real property courts of law find themselves fettered with rules, from which they cannot depart, because they are fixed and established rules; though equity may interpose, not to contradict, but to correct, the strict and rigid rules of law. But in mercantile questions no distinction ought to prevail. The mercantile law of this country is founded on principles of equity; and when once a rule is established in that court as a rule of property, it ought to be adopted in a court of law. For this reason courts of law of late years have said that, even where the action is founded on a tort, they would discover some mode of defeating the [\*202] plaintiff, unless his action were also \*founded on equity; and that though the property might on legal grounds be with the plaintiff, if there were any claim or charge by the defendant, they would not consider the retaining of the goods as a conversion.

In considering this case, it seems to me that two questions will embrace all the circumstances of it ;—First, Whether or not there was any appropriation of these bills to the discharge of the acceptances made by the bankrupt? Secondly, What is the effect of an act of bankruptcy in the stage in which it did happen in this case? On the first question, no case directly in point has been produced, as having occurred either in a court of law or equity; for it seems to me that *Ex parte Dumas* is distinguishable from the present. There the account was opened by Dumas with Jullian in the letter G; therefore, as between those parties, the account G stood as the account of a different person and a different correspondent with Jullian. And Lord Hardwicke only said, that as the parties had opened a particular account, as distinguished from the general account and which was to be considered as the account of a different correspondent, the assignees of Jullian should not blend that account with the general one, though they were both opened between the same parties. But that is by no means this case: for here was no particular account between these parties. If we were to say that there was, it would equally extend to all cases where a tradesman dealt in one commodity only, and then the law would be thus; if a man dealt in tobacco to any extent, but in no other article, all his dealings in that article must be considered as dealings on a particular account; but it would be a general account, if his dealings were extended to several articles. But I cannot accede to such a proposition. According to my ideas, it must be one entire transaction, in order to make a particular account; as if A. by letter order certain goods to be sent to him, and enclose in that letter bills to a given amount to pay for those goods; that is one entire transaction, and it may be called an appropriation of those bills to answer for the goods. But there is nothing of that kind here; these parties had not a particular transaction only in their contemplation, but they came to a general agreement, which was to form the basis of a general \*dealing between them to any extent, and to be continued to an indefinite length of time. No doubt can be entertained re- [\*203] specting this agreement, for it is found in express terms in the verdict; according to that, Daniel was to purchase of the plaintiff all the light guineas, which the latter should send, at a certain price; the plaintiff was to draw on Daniel for the money due upon such sales, the bills to be payable at the end of two months, and Daniel was also from time to time to accept other bills to be drawn by the plaintiff for his own convenience. This agreement was entered into in 1789, and the parties continued to act under it for two years and upwards before the bankruptcy of Daniel. It was not stipulated that the parties in their dealings should be confined to a certain quantity of light gold, or to any precise value, but the plaintiff was to send all the light guineas which he could collect. This, therefore, was a general agreement in the outset, and if so, I think it puts an end to the first part of this case. If this were not a general account, in what does the particularity consist? These two persons continued to deal generally together as far as they could extend their dealing, which excludes the idea of a particular account. Then the plaintiff must come in under Daniel's commission.

The next point to be considered is the effect of the bankruptcy. And I think that some points have been made by the defendant's counsel, which have not been answered. They contended, that when these goods came to the hands of the assignees the property was vested in them; and, if so, that nothing has happened since to divest it. This is an important part of the case; and, therefore, it is material to consider whether or not this property was vested in the assignees. It has been held that bankruptcy does not put an end to the contract; that was so stated by Lord Kenyon and myself in *Ellis v. Hunt*, and that doctrine was not then new; for in *Haswell and others v. Hunt and others*, assignees of Lacey, the same point was ruled. [Here MR. J. BULLER read the following note of this case:—"In trover the case was this. Lacey came to the plaintiffs and bought a parcel of tobacco, to be paid for in ready money; this was in the morning. He left orders at his [\*204] house for receiving the tobacco, and the same day \*went to France to absent himself from his creditors. After he was gone, the plaintiff's servant brought the tobacco to Lacey's house, but had no orders to make any demand of the money, but only to deliver the goods. The question was, Whether this was a complete sale, so as to vest the property in Lacey, or whether his bankruptcy between the sale and the delivery was such a fraud as avoided the sale by non-payment of the money? Lord Chief-Justice Eyre held that the sale was made complete by the act of the plaintiffs, who, by delivery of the goods without demand of the money, vested the property in Lacey by their own assent, as a complete sale *ab initio*, without ready-money; and the plaintiffs were nonsuited.—G. Hall, E. 12, G. J. Burnet's MS."'] It seems then established that bankruptcy does not at all events put an end to the contracts of the bankrupt. After the bankruptcy several contracts have been held to be binding on the bankrupt, though the creditors could not prove their debts under the commission. It is therefore material to see by the special verdict what the agreement here was, and when it commenced. The foundation of this dealing was the agreement which was made two years before; the next stage in the cause was the acceptance of the bills which had been previously drawn by the plaintiff on Daniel; at the time of the bankruptcy, Daniel was under acceptances to the amount of more than £800. It appears then that a substantial part of the contract was carried into execution at the time of the bankruptcy; and the cases I have mentioned show, that so far from what was afterwards done being void, it must be supported in order to put the bankrupt on a fair footing with the plaintiff. Then what was the situation of things at the time of the bankruptcy, for that is the material time to be attended to. The bankrupt was then under acceptances to the amount of £873, and had only goods in his hands of the value of £531 on this agreement. This property was then vested in the assignees; and how could it be altered afterwards? Not by the bankrupt, because all his effects were vested in the hands of his assignees for other purposes. And if the bankrupt could not divest this property, on what authority could the plaintiff do so? It has been contended that the plaintiff might retake these goods after Daniel's bankruptcy, in order to

repay himself \*more than the other creditors ; but it cannot be permitted to him to carve out for himself ; the instant the bankruptcy happened he stood in the same situation with the other creditors, over whom he could not gain a preference by his own acts. To hold that he could, would be to open a door to contrivance ; particular creditors would carve out for themselves, and leave very little for the rest. If, therefore, at the time of the bankruptcy the plaintiff could not have retaken these goods, I think that he cannot acquire a right to do so by any subsequent act of his own. It was well put by the defendant's counsel that, if the plaintiff had become a bankrupt after Daniel had accepted the bills, Daniel's property would have been liable. Or suppose Daniel had never obtained his certificate, he might be arrested for this very sum ; and yet it is said in conscience he ought not to have taken these goods when they came. But it seems to me that the conscience of the case, at the time of the bankruptcy, was with the bankrupt ; for he was then liable for these acceptances, and had not sufficient in his hands to pay them. With regard to one part of the verdict, where it is found that the goods in question were sent by the plaintiff to Daniel, "in order to enable the latter to pay the bills accepted by him," and on which considerable reliance has been made in the course of the argument, these words must not be taken by themselves, but the whole agreement must be construed together ; and then it will appear that they were not sent to pay particular bills, but on the general account which subsisted between the parties, to pay all the bills which should become due. These were merely sent to put them into cash, in order that Daniel might repay himself. On the whole, therefore, it appears to me that the justice of the case, considered at the time of the bankruptcy, is with the bankrupt, as well as the law of the case.

GROSE, J.—This is one of those unfavourable cases under the bankrupt laws, where an endeavour is made to take the property of one man to pay the debts of another. There can be no doubt, therefore, about the justice of the case ; for the plaintiff has paid the acceptances of the bankrupt, and the goods were only sent to the bankrupt for the express purpose of paying \*those acceptances. The form of this action is trover ; and the question is, Whether the property of these [\*206] goods be in the plaintiff or the defendants ? There was a time when the exclusive property was clearly in the plaintiff ; then it may be asked, Has it ever been in the defendants ? or, if it have, has it ever reverted in the plaintiff ? The defendants claim a right to retain these goods under an agreement ; and in the argument they considered this as a case of goods sold and delivered under that agreement ; if it really were a sale of the goods under the former part of the agreement, I should have considerable doubts about the case. But the words of the agreement are material to be considered ; for I think that it consists of two parts, and that the transaction on which this question arises grows out of one part of it only. The first part of the agreement was, that the bankrupt should purchase of the plaintiff all the light gold that the latter should send, and that the plaintiff should draw bills upon the bankrupt for the money due upon such sale, payable at the end of two months : the other

part of the agreement was, that Daniel should from time to time accept other bills drawn by the plaintiff for his own convenience, and that the plaintiff should in such case remit value to Daniel to the amount of such acceptances, to answer together with the light gold for the different bills so drawn on Daniel. Then let us see whether what passed between these parties under the first part of the agreement can be considered as a case of goods sold and delivered; if the gold is to be considered as goods sold to the defendant, then bills were to be drawn by the plaintiff on the bankrupt at two months; but in the verdict not a word is said about the bills being drawn for the light gold mentioned in the verdict. The state of the transaction at the time of the bankruptcy was this: there were acceptances by the bankrupt to the amount of £873 over and above the gold and bills in question. Now, the bankrupt being under such acceptances, what was the probability of the transaction? Not that the plaintiff would sell the gold, but that he would remit goods to discharge the acceptances. However, we are not left to determine on conjecture or probabilities on a special verdict; for it is expressly found as a fact that the plaintiff, in order to enable the bankrupt to pay the [\*207] acceptances when they \*should become due, sent the goods in question; and it is also found by the verdict that those bills were afterwards paid by the plaintiff. Then the purpose for which the property in question was sent, was answered by the plaintiff himself; and that lets in the doctrine of Lord Hardwicke in the case *Ex parte Dumas*, which I consider immediately and directly in point. The instant the acceptances were taken up by the plaintiff, and the end for which the goods were sent was answered, I consider the property as re-vested in the plaintiff. But it has been asked, When and how was this property re-vested in the plaintiff? I consider it to have been a qualified and conditional property in the defendants; it was not vested in them as an absolute and unconditional property by the transmission for a particular purpose: it was vested in them only for a special purpose, and the instant that purpose was answered in another way, the property was re-vested in the plaintiff. Then it was asked, What would have been the case had the acceptances been discharged by the bankrupt? I answer, that in such a case the purpose for which they were sent would have been answered by the bankrupt, and then the plaintiff would have had no property in the goods; then that property which was before conditional would have become absolute in the bankrupt. This case comes directly within that of *Dumas*; for here the goods were sent for a particular purpose, the property vested in the defendants for a particular purpose, and as soon as that purpose could not be answered by the bankrupt, or was otherwise answered by the plaintiff, the property re-vested in the plaintiff; and therefore I think he may maintain this action of trover to recover back this property, or the value of it.

PER CURIAM,—Judgment for the plaintiff.

A writ of error having been brought in the exchequer court, the judgment was affirmed.

Lord Chief-Justice EYRE.—The case was well and laboriously argued at the bar. It was very full of thorny points, which necessarily required

from us a good deal of investigation. The consequence has been that a length of time, perhaps somewhat \*inconvenient to the parties, has elapsed before we could come to an agreement. We have at [\*208] length come to an agreement, and we are all of opinion that this judgment ought to be affirmed. I shall state very shortly the reasons which have induced me to concur in that opinion. The right of the parties to the light gold and bills, which are the subject of this action, appears to me to depend principally upon the true construction of the original agreement between Tooke and Daniel, made two years and upwards before the bankruptcy. That agreement consisted of two parts; one being a contract for a bargain and sale of light gold by Tooke to Daniel at a given price, to be paid for by bills of exchange payable at two months, a simple and unembarrassed transaction; the other being a contract, the effect of which was that Daniel should become Tooke's banker, that he should accept his bills, Tooke remitting value to the amount of such acceptances in bills and in light gold. That is plainly the effect of the latter part of the agreement. They might have dealt as mere merchants, the one selling and the other buying this article of light gold, and paying for it according to agreement. And had this been a case of that kind, the transaction would have had one complexion, and the argument upon it, I think, would have taken one course. But as they might act in that manner, so they might upon the latter branch of the agreement act as principal and factor, or principal and banker, and not as mere merchants; and the idea of bargain and sale would enter no farther into their transactions upon that branch of the agreement, than merely as it went to fix the price at which the light gold which should be remitted from time to time should be carried to the account of Tooke as cash, and be applied by Daniel, as Tooke's agent, in payment of the acceptances which he had made on the credit of Tooke. There would certainly be this mixture of bargain and sale in any transactions which should take place even under the latter branch of the agreement, which in other respects would be the transaction of principal and factor, or principal and banker. But though there be this mixture, yet I think the case of the light gold cannot, in respect of that circumstance, be separated from the case of the bills. If Daniel was to be considered as factor or banker only with respect to the \*bills which should be remitted, he ought to be considered as banker or factor only, as to the light gold, with an [\*209] agreement on his part to apply that light gold in payment of his acceptances at the rate fixed in the former part of the agreement. In a word, the bargain and sale of the light gold, when considered under the second branch of the agreement as a remittance to pay the acceptances, is but an incident in the business of the principal character of factor or banker. Now if it can be established that Tooke and Daniel acted in the characters of principal and factor, their respective rights of property are very easily ascertained; the general right of property would be in Tooke, the special right of property in Daniel, to enable him to execute the commission with which Tooke had entrusted him, and he would also have a

“ lien as against the general property of his principal, for the balance of his account. In this way of considering the case, we may lay all this

story of the bankruptcy entirely out of the question. For suppose Daniel had remained solvent, Tooke might at any time have paid him his balance, including any acceptances he might be under, and have withdrawn his effects out of Daniel's hands, and there could have been no room for a question between them, but merely as to the profit upon the light gold, estimated at the price in the agreement. Now I think that would depend upon the question whether the light gold was sold under the first part of the agreement, or whether it was to be considered as a mere article of remittance under the latter part; and according to my view of the case, I think that question would be decided against Daniel. The assignees standing in the place of Daniel, certainly can be in no better condition than Daniel himself; they may be in a worse condition if many of the arguments which we heard at the bar, and of which we have an account in print, are well founded. But those arguments take a very wide compass indeed; they involve, as I have already said, points of considerable difficulty upon which we have not formed an opinion, and upon which, perhaps, an opinion ought not to be formed till the points come judicially and unavoidably before the court. If that discussion can be avoided now, I think we do our duty by delivering an opinion upon narrower grounds. The ground I have taken is very \*distinctly [\*210] marked, and very well enforced in the argument of one of the judges of the Court of King's Bench. He concludes somewhat differently from me, but the ground-work is there. In my opinion it may be sustained, it steers clear of all difficulties, and it reaches the substantial justice of the case, because it meets the only argument of considerable weight that struck my mind, namely, the possibility that the bankrupt might have been the creditor, and the injustice which would have been done to his estate if these effects could, on account of the bankruptcy, have been withdrawn from the mass of his estate. Now, as the principle upon which my opinion proceeds is, that the bankrupt would have a lien upon those effects for every thing for which his estate was creditor, that difficulty is removed. Upon this ground, I concur in thinking that the judgment in this case ought to be affirmed, and it is the unanimous opinion of the court that the

Judgment be affirmed.

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WHERE AN AGENT IS ENTRUSTED WITH PROPERTY OR MONEY FOR A SPECIAL PURPOSE, AND HE MISAPPLIES THE MONEY OR PROPERTY SO ENTRUSTED TO HIM, THE PRODUCT OF, OR SUBSTITUTE FOR SUCH PROPERTY OR MONEY, MAY BE RECLAIMED BY THE PRINCIPAL SO LONG AS IT CAN BE ASCERTAINED TO BE SUCH PRODUCT OR SUBSTITUTE.

### TAYLOR v. PLUMER.

Feb. 10, 1815.—E. 3 M. & S. 563. Eng. Com. Law Reps., vol. 30.

TROVER for the certificates or securities for 50 shares in the Bank of



the United States of America, and for the certificates or securities for certain sums in the three per cent. funded stock of the United States, and the powers of attorney respectively relating thereto, and also for certain bullion, viz., 71 doubloons and a half. Plea, general issue.

At the trial before Lord Ellenborough, C. J., at the London \*sittings after Michaelmas Term, 1813, there was a verdict [\*211] for the plaintiffs, damages £10,459, 18s. 6d., in respect of the securities, and £302 in respect of the bullion, separately, subject to the opinion of the court upon a case reserved, which stated the plaintiffs to be the assignees of Walsh, under a commission of bankruptcy of the 10th of December, 1811. Walsh was a stockbroker, who had occasionally been employed by the defendant for some time before 1811. In August of that year, the defendant, expecting to have occasion for a large sum of money at Michaelmas, to pay for an estate which he had contracted to purchase, consulted Walsh on the propriety of selling out stock to provide for such payment, and desired him to inform him when he, Walsh, thought it would be most expedient to do so. In November, the title to the estate not having been then completed, Walsh, thinking the funds likely to fall, recommended to the defendant to sell out stock, being principally in a fund which is regularly shut from the beginning of December till about the 7th of January; and the defendant having considered the matter, on the 28th of November sent Walsh orders to sell. Sales were accordingly effected by Walsh, as broker, on the 29th, to the amount of £21,774, 5s. sterling, the transfers to be made and the money to be paid on the 4th December. On the 4th the stock was transferred by the defendant, and the price was received by Walsh, who, on the same day, paid £21,500, part of the said price, into the hands of Messrs. Goslings and Co., the defendant's bankers, to the defendant's account, and saw the defendant and informed him of it. The defendant proposed to Walsh to invest the money in exchequer bills until it should be wanted to pay for the estate, and in the evening desired him to call the following day for a draft, in order that he, as broker, might buy exchequer bills for the defendant. Accordingly, on the next day, the 5th, about 11 o'clock in the forenoon, Walsh called, when the defendant said he had more money at his bankers than he wished to keep unemployed, and gave him a draft upon Goslings for £22,200, which he directed him to lay out for him in the purchase of exchequer bills, to be delivered on the same day to him, the defendant, or his bankers. The defendant did not authorize Walsh, nor was Walsh in any manner authorized, to apply the draft or money \*to be received for it, to any other purpose, [\*212] nor had the defendant any reason to expect or apprehend that it would be applied to any other purpose. Walsh went to Goslings, received the amount of the draft from them in twenty-two Bank of England notes of £1000 each, and one for £200, but purchased exchequer bills to the amount of £6500 only, having bought them in the usual course of business, and he lodged them at Goslings on the defendant's account. About four in the afternoon he called on the defendant and told him that he had lodged the £6500 exchequer bills at Goslings, and that he had agreed for the remainder of the intended purchase of ex-

chequer bills to be delivered at a future day, and had therefore left a sum, which he named, (being an even sum nearly corresponding with the difference of the £22,200,) to his account at Goslings. But the fact was not so; on the contrary, Walsh being ruined in his circumstances, and completely insolvent, had, between the time of the sale of the defendant's stock and the time when he received the price of it, conceived an intention of absconding with the money when it should come to his hands, and with that view, on the 2d of December, had given orders for the purchase of the American shares, stock, and bullion in question, in order to take them with him abroad, having no means of paying for the American shares and stock but out of the money he expected to receive belonging to the defendant, nor any money of his own to pay for the bullion, though he might have acquired money for that, but intending to pay for that also out of the defendant's money. Accordingly, after receiving the draft at Goslings, he went immediately from thence to the American stockbrokers in the city, received the certificates, and paid for them with eleven of the identical Bank of England notes of £1000 each, which he had just received, taking back from the broker to whom he paid them the difference of £540, 1s. 6d. The same morning he delivered to his brother-in-law another of the £1000 bank-notes, and received from his brother-in-law in exchange, a draft, of the firm in which he is a partner, on their bankers for £500, and another draft for £100, leaving the remainder in his brother-in-law's hands, and with the £500 draft he paid for the bullion, receiving the difference from the goldsmith [\*213] who furnished it. Walsh had a dwelling-house \*at Hackney, where he resided with his wife and family, and also a counting-house in London, where he carried on his business. About nine in the morning of the 5th, he left his dwelling-house, taking with him clothes and other necessaries for his journey, intending not to return, but to leave London in the evening by the mail-coach, in which he had taken a place on the 3d or 4th, and to proceed immediately to Falmouth, and from thence by the first packet to Lisbon, and so to North America. He left London accordingly by the mail-coach, taking with him the securities and bullion in question. He was pursued by the defendant's attorney and a police officer, by the defendant's desire, the attorney having a general authority to act for the defendant, but no particular directions; and on the 9th they overtook Walsh whilst he was waiting at Falmouth for the packet's putting to sea, and he then surrendered up the property in question to the attorney for the purpose of being assigned over to the defendant, and in the course of that day executed a deed, which was prepared by the attorney's order, assigning the property to the defendant in trust, to sell and pay himself a debt of £15,500, (being about the difference between the price of the £6500 exchequer bills and the £22,200,) also a bond to the defendant in the penalty of £31,000, conditioned for the payment by him of £15,500, and interest at five per cent., and a warrant of attorney for confessing a judgment upon such bond, which were also prepared by the attorney at the same time, and after being executed were delivered to him, the attorney and the police officer witnessing the same. They all returned to London, when Walsh

was carried before a magistrate, and afterwards indicted for felony, tried, and found guilty, subject to the opinion of the judges, but was afterwards pardoned without any judgment having been pronounced. The case also stated that the act of bankruptcy was committed on the 5th of December, that Walsh's advice to the defendant to sell out his stock was given *bona fide*, and no false pretence or imposition was used to obtain the defendant's draft upon Messrs. Goslings, or the possession of the money which he afterwards received and misapplied, and that the property in question, which was surrendered by Walsh to the attorney, was delivered up by the attorney to the defendant, of whom the plaintiffs \*demanded it, but the defendant refused to deliver any of it, [\*214] and sold the whole and received the proceeds. The question for the opinion of the court is, Whether the plaintiffs are entitled wholly, or in part, to recover; if they are, the verdict is to be entered accordingly; if not, a nonsuit to be entered.

*Marryat*, for the plaintiffs in the last term, argued that the defendant had not any lien upon the property in question, as against the plaintiffs, the assignees of Walsh, and therefore was not entitled to withhold the proceeds from them. He admitted that specific property in the possession of an agent, who becomes bankrupt, which was entrusted to him for a special purpose, belongs to the principal, and not to the representatives of the bankrupt agent; also, that where the property is not the same, but has been acquired by the bankrupt in lieu of the trust-property, and in pursuance of the trust, the same rule applies to it, provided such property is capable of being ascertained. So he said is the rule also between a trustee or his executors after his decease, and *cestui que trust*, and *Burdett v. Willet*, 2 Vern. 638; *Ex parte Chion*, 3 P. W. 187; and *Haffal v. Smithers*, 12 Ves. 119, all come within one or other of those rules. But he took this distinction, that where the property has been tortiously acquired by the agent in fraud of the trust, there the lien of the principal is at an end, because he cannot, for his own private advantage, and to the prejudice of all the other creditors, aver what has been done in fraud of his trust to have been done in execution of it. And upon this distinction he founded the argument for the plaintiffs; for here he said it was plain that the property which the defendant claimed to retain, was property which Walsh had acquired by conversion of the trust-property to his own use, in contravention of the purposes of his trust. Wherefore it shall not remain to the defendant, but shall pass by the assignment, like the rest of the bankrupt's property, to the general body of creditors. In like manner a court of equity has refused to extend the lien to lands purchased by the misapplication of trust-money, *Cox v. Bateman*, 2 Ves. 19; or to any lands purchased by a trustee, where it is not clear that they were purchased in execution of his trust,—*Perry v. Phelips*, 4 Ves. \*108. So that in equity the distinction is plain; where the estate is purchased in execution [\*215] of the trust, the court will hold it subject to the trust; but where the purchase is a breach of the trust, *cestui que trust* stands merely as a simple contract creditor, the estate purchased not being subject to the trust. If, as the defendant would have it, a principal may follow the

property entrusted by him to his agent for a special purpose, through all the changes which it may undergo in the hands of the agent, without regard to the object of his trust, to what confusion would it lead. According to that, if A. entrusts his agent with money to purchase a horse, and the agent, instead of purchasing a horse purchase a carriage, A. shall have the carriage. Or if in this case Walsh had exchanged the bank notes in part for goods, and in part for other moneys, and with those other moneys had purchased bullion, or a shop with the stock in trade, and commenced trader, the defendant would have been entitled not only to the various articles purchased with the bank notes and moneys, but also to the shop and stock in trade, together with all the credits arising from the trade. Such a doctrine would lead to great practical inconvenience, whereas the rule is simple and convenient, that so long only as the property remains identically the same, or subsists in a form consistent with the trust, it shall enure to the benefit of the principal. And there is reason as well as convenience in so limiting the rule; for as the principal would not be bound to take the property, if purchased by the agent in violation of the trust, so it is only so long as he would be bound to accept it that he can reasonably call it his own. In *Scott v. Surman*, Willes, 400, the factor acted in pursuance of his trust when he took the notes in payment of the goods sold by him for his principal, and therefore the notes might well be deemed the property of the principal consistently with the distinction already taken. The same may be said of *Gladstone v. Hadwen*, 3 M. and S. 517; for the bills were the identical bills which had been delivered to the bankrupt, and the bank notes were part of the proceeds of one of the bills which had been exchanged by the bankrupt in pursuance of his authority. And besides, the main distinction of that case is, that the bills were originally obtained by the bankrupt by a criminal fraud indictable and [\*216] \*punishable with transportation; whereas here, all fraud in the obtaining of the draft or money is distinctly negatived, and it does not appear that Walsh has been guilty of any indictable offence. Under these circumstances, could the defendant have maintained trover for the property, if it had been withheld from him? If he could not, the circumstance of Walsh's having surrendered the property to him will not vary his rights, nor can the defendant, by accepting the farther securities from Walsh, be considered as having waved the tort and confirmed Walsh's acts.

*Abbott*, contra, denied the distinction taken on the other side, contending that the rule was general, that nothing passed by the assignment but what was in equity, as well as law, the property of the bankrupt. Accordingly Willes, C. J., in *Scott v. Surman*, ante p. 179, declared that "his notion was that the assignees are not to be considered as general assignees of all the real and personal estate of which the bankrupt was seised and possessed, as heirs and executors are of the estates of their ancestors and testators, but that nothing vests in them, even at law, but such real and personal estate of the bankrupt in which he had the equitable as well as legal interest." Upon this principle the court took notice in *Winch v. Keeley*, 1 T. R. 619, that the debt, though in

point of law due to the bankrupt, was subject to a trust, and therefore did not pass to his assignees, but might be recovered to the use of the assignee of the debt. And the same principle governed *Gladstone v. Hadwen*. And the better reason why equity would not interfere in *Cox v. Bateman* and *Perry v. Phelps* seems to be, because it did not appear the lands were purchased with the trust-money; besides, in *Cox v. Bateman* the lands were in Ireland. But *Lane v. Dighton*, *Ambl.* 409; *Balgney v. Hamilton*, *Willes*, 414; *Wilson v. Foreman*, *Dick.* 593, all show that if trust-money be misapplied in the purchase of land, a court of equity will follow it in the hands of the purchaser. So equity will follow goods in the hands of a factor, in behalf of him who employed the factor, though the goods were purchased not in pursuance of the factor's authority. *Whitecomb v. Jacob*, *Salk.* 160, and in *Ex parte Sayers*, 5 Ves. 169, a principal was \*held entitled to follow bills in the hands of his factor, though such bills were not shown to be part [\*217] of the proceeds of the bills remitted by him to the factor. From all which it appears that the true distinction is not whether the property in the hands of the factor is such as has been acquired by him in pursuance of his trust, but whether it can be specifically distinguished and ascertained to belong to the principal and not to the bankrupt.—3 Burr. 1369. Accordingly Lord Mansfield, in *Miller v. Race*, 1 Burr. 457, finds fault with the reason given for the position, that money cannot be followed, viz., because it has no ear-mark; adding, that “the true reason is on account of the currency of it, it cannot be recovered after it has passed in currency; and Buller, J., adopts the same distinction in *Rex v. Egginton*, 1 T. R. 369, when he says, “that if the sum of money in question had been kept by itself, the bankrupt's assignees could not have touched it.” As to the argument, that where the property has been tortiously acquired by the factor, the principal cannot affirm such tortious act; it is contrary to what is laid down by *Willes, C. J.*, in *Scott v. Surman*, ante p. 179, for according to him, “a man may in many cases either consider another as a wrongdoer, or as a receiver of money to his use, as he thinks best and most for his advantage;” and therefore he supposes the case of a factor selling contrary to his authority, and says, “even in that case the owner may come either against the vendee or the factor at his election, and may choose to confirm the sale.” And upon the same principle it is, that oftentimes an action for money had and received is maintained instead of trover, from which no inconvenience can result, so long as the owner is bound to trace and ascertain the property to be his, and the rights of third persons do not intervene. As to the observation made upon *Gladstone v. Hadwen*, that there the transaction originated in fraud, whereas here was no fraud in the commencement, that can make no difference, if it appear that the property was converted by fraud; nor in this case is it to be assumed that the fraud is not indictable, because it is not indictable as a felony. But independently of any fraud, the defendant is entitled to retain if these positions be well-founded; viz., that a party has a right to the produce of his money which has been \*misapplied by his agent, so long as such produce remains in the hands of the agent, and is capable of being ascer- [\*218]

tained; and that he has the same right against the assignees of the agent who becomes bankrupt; and, consequently, that if he possess himself of such produce he has a right to withhold it from the assignees.

*Marryat*, in reply, said that *Whitecomb v. Jacob*, as it stood upon the report, and unless it could be explained thus, that the money was vested in other goods by the factor for his employer, in which case it would come within the rule agreed to on all hands, was of doubtful authority, and had been so treated, subject only to this explanation, by several text writers, and that he had searched at the register office for the decree without success. And as to *Ex parte Sayers*, that all that was there done was in execution of the factor's authority; and in *Lane v. Dighton* there was evidence in the party's hand-writing that the trust-stocks had been sold, and the money laid out from time to time in the purchase of the land, and nothing to show that it was not in pursuance of the trust.

At the conclusion Lord Ellenborough, C. J., after observing that the case had been well argued, said that from its importance, and considering the grounds on which the argument had been founded, it was fit that the court should look into it. That he had been unable to find any authority for the position that so long as the property is such as has been substituted by the agent in execution of his authority, the principal is entitled to it; but that the right of the principal ends whenever the deviation of the agent's authority begins. That if there had been any case which had determined that to be the dividing point, it would have been very material to have shown it.

To which *Marryat* answered, that he did not put it as the point established negatively by any case, but only that none of the cases had affirmed the right of the principal farther than that point.

*Cur. adv. vult.*

[\*219] \*Lord ELLENBOROUGH, C. J., on this day delivered the judgment of the court. After stating the case, his lordship said, the plaintiff in this case is not entitled to recover if the defendant has succeeded in maintaining these propositions in point of law, viz., that the property of a principal entrusted by him to his factor for any special purpose belongs to the principal, notwithstanding any change which that property may have undergone in point of form, so long as such property is capable of being identified, and distinguished from all other property. And, secondly, that all property thus circumstanced is equally recoverable from the assignees, of the factor, in the event of his becoming a bankrupt, as it was from the factor himself before his bankruptcy. And, indeed upon a view of the authorities, and consideration of the arguments, it should seem that if the property in its original state and form was covered with a trust in favour of the principal, no change of that state and form can divest it of such trust, or give the factor, or those who represent him in right, any other more valid claim in respect to it, than they respectively had before such change. An abuse of trust can confer no rights on the party abusing it, nor on those who claim in privity with him. The argument which has been advanced in favour of the plaintiffs, that the property of the principal continues only so long as

the authority of the principal is pursued in respect to the order and disposition of it, and that it ceases when the property is tortiously converted into another form for the use of the factor himself, is mischievous in principle, and supported by no authorities of law. And the position which was held out in argument on the part of the plaintiffs, as being the untenable result of the arguments, on the part of the defendant, is no doubt a result deducible from those arguments: but unless it be a result at variance with the law, the plaintiffs are not on that account entitled to recover. The contention on the part of the defendant was represented by the plaintiffs' counsel as pushed to what he conceived to be an extravagant length, in the defendant's counsel being obliged to contend, that "If A. is trusted by B. with money to purchase a horse for him, and he purchases a carriage with that money, that B. is entitled to the carriage." And, indeed, if he be not so entitled, the case on the part of the defendant appears to be \*hardly sustainable in argument. It makes no difference in reason or law into what other [\*220] form, different from the original, the change may have been made, whether it be into that of promissory notes for the security of the money which was produced by the sale of the goods of the principal, as in *Scott v. Surman*, Willes, 400, or into other merchandise, as in *Whitecomb v. Jacob*, 160, for the product of or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description. The difficulty which arises in such a case is a difficulty of fact and not of law, and the dictum that money has no ear-mark must be understood in the same way; *i. e.*, as predicated only of an undivided and undistinguishable mass of current money. But money in a bag, or otherwise kept apart from other money, guineas, or other coin marked (if the fact were so) for the purpose of being distinguished, are so far ear-marked as to fall within the rule on this subject, which applies to every other description of personal property whilst it remains, (as the property in question did,) in the hands of the factor, or his general legal representatives. That trust property in the possession of a factor empowered to dispose of it for his principal does not pass to his assignees under the Statute Jac. I. upon his becoming a bankrupt, was established in the case of *L'Apostre v. Le Plaistrier*, first tried before Lord Holt at Nisi Prius in 1708, and afterwards so adjudged upon a case made for the opinion of the court of King's Bench. The same point was held by Lord Cowper in *Copeman v. Gallant*, 1 P. Wms. 320. And in *Whitecomb v. Jacob*, in chancery, Trin. 9 Ann. Salk. 160, the doctrine was carried further, and to an extent which fully comprehends the present case. There, a factor entrusted with the disposal of merchandise for his principal, sold it, received the money, and, instead of paying the money to his principal, vested the produce in other goods, and died indebted in debts of a higher nature. There it was held that those goods should be taken as the merchant's estate, and not the factor's; and though that was not the case of a factor becoming a bankrupt, \*yet it makes no difference whe- [\*221]

ther the person claiming to represent the factor was his executor or administrator, or his assignee; except only as far as the case might be affected by the statute, Jac. I., and which it cannot be, if the factor bankrupt had the order and disposition of the property entrusted to him in the character of factor only, and not as owner: for that point the above-cited cases of *L'Apostre v. Le Plaistrier* and *Copeman v. Gallant*, are authorities. Some doubt was attempted to be thrown upon the authority of the case of *Whitecomb v. Jacob*, Salk. 160, in the argument by the plaintiffs' counsel; but that case is expressly referred to by Lord C. J. Willes as an authority in law, and recognised by him as such in his judgment in *Scott v. Surman* before referred to. In the case of *Ryall v. Roll*, 1 Atk. 172, Mr. Justice Burnett, (who, together with Lord C. J. Lee and Lord C. B. Parker assisted the chancellor Lord Hardwicke, in the judgment upon that occasion,) is reported to have cited the case of *Whitecomb v. Jacob*, as it is given us in Salk. 161, as well as that of *Scott v. Surman* before Lord C. J. Willes, (though he cites, or the reporter Atkins represents him as citing, the latter by the mistaken name of *Salmon v. Scott*.) And Lord C. J. Lee recognises the general principle that things arising from the sale of other things "follow the nature of the goods themselves," and he adds, "Mr. Justice Burnett has cited cases to show that they are so where the thing can be discovered. The cases cited by Mr. Justice Burnett were the very cases of *Whitecomb v. Jacob*, (in respect to which the doubt has been suggested to us,) and the case of *Scott v. Surman* before Lord C. J. Willes. The cases were cited by Mr. Justice Burnett, 1 Atk. 172, A. D. 1749, in these terms:—"Suppose goods are consigned to a factor, who sells them and breaks, the merchant for the money must come in as a creditor under the commission; but if the money is laid out in other goods, these goods will not be subject to the bankruptcy, 1 Salk. 160. Suppose, instead of selling the goods for ready money, he sells for money payable at a future day, and breaks before the day, if the assignees receive the money, it will be for the use of the merchant: or suppose that the factor had taken notes for the goods, if his assignees receive the money upon these notes, it [\*222] will be to the merchant's use. This was determined in C. P., *Salmon v. Scott*, Hill. 16 Geo. II., 1742-3." Lord C. J. Lee adds "*Swynburne*, 506, 6th edit., is upon the same foundation. If a man devises his moveable goods to B., and his immovable to C., upon a question how the debts shall go, he says, those debts which did arise by occasion of the things moveable, and for recovering whereof there lies an action personal, belong to that person to whom the testator did bequeath his moveable goods, which shows that the produce of the goods were of the same nature with the goods themselves." Lord Mansfield, in 3 Burr. 1369, in the case of a bankrupt executor, holds that the specific effects of the testator do not pass under the commission, he says,—“If an executor becomes bankrupt, the commissioners cannot seize the specific effects of the testator, not even in money which specifically can be distinguished and ascertained to belong to such testator, and not to the bankrupt himself.” Specific remittances, as in *Ex parte Chion*, 3 P. Wms. 189, and in *Hassall v. Smithers*, 12 Ves. 119, are governed by the



same principle. The representatives, whether deriving their title to the property through the death, or by the bankruptcy of the person possessed of it, can be in no better plight than the person whom they represent would have been, and hold it, if it comes to their hands, in trust for and applicable to the same purposes as he held it, and not as part of the proper estate of the deceased or bankrupt person. As to the following money into land, the court of chancery has (as said by Lord Hardwicke, in the case cited of *Lane v. Dighton*, and others, Amb. 409,) been very cautious of doing it, but has done it in some cases. No one, says Lord Hardwicke, will say but the court would do it, if it was actually proved that the money was laid out in land. The doubt with the court in those cases, he says, has been as to the proof. There is difficulty in admitting proof; parole proof might let in perjury, but it has always been done, he he says, when the fact has been admitted in the answer of the person laying it out." There is, therefore, according to Lord Hardwicke, who had on that occasion the principal authorities on the subject brought in review before him, no difficulty but in respect of the proof; which difficulty, particularly as arising from the statute of frauds and perjuries, \*seems to have weighed with Lord Sommers, and the master of the rolls, and Mr. J. Powell, against the charging the land in the [\*223] case of *Kirk v. Webb*, Prec. in Chan. 84. No difficulty, however, of that kind in respect to proof, nor any peculiar rules or habits of courts of equity in respect to the charging of land, stand between the original proprietor and his rights in respect to the ascertained produce of his own funds upon this occasion. He has repossessed himself of that, of which, according to the principles established in the cases I have cited, he never ceased to be the lawful proprietor; and having so done we are of opinion that the assignees cannot in this action recover that which, if an action were brought against them the assignees by the defendant, they could not have effectually retained against him, inasmuch as it was trust property of the defendant, which, as such, did not pass to them under the commission. If this case had rested on the part of the defendant on any supposed adoption and ratification on his part of the act of converting the produce of the draft or bank-notes of the defendant into these American certificates, we think it could not have been well supported on that ground, inasmuch as the defendant, by taking a security by bond and judgment to indemnify himself against the pecuniary loss he had sustained by that very act, must be understood, to have disapproved and disallowed that act instead of adopting and confirming it; but upon the other grounds above stated, we are of opinion that the defendant is entitled to retain the subjects of the present suit, and of course that a nonsuit must be entered.

[\*224] \*WHERE AN AGENT CONTRACTS IN HIS OWN NAME HE BECOMES PERSONALLY LIABLE ON THE CONTRACT, ALTHOUGH THE OTHER CONTRACTING PARTY KNOWS THAT HE IS ACTING NOT AS A PRINCIPAL BUT AS AN AGENT.

# I.—LEADBITTER v. FARROW.

Nov. 12, 1816.—E. 5 M. & S. 345.

ASSUMPSIT upon a bill of exchange and the money counts. Plea, non-assumpsit. At the trial before Lord Ellenborough, C. J., at the London sittings after last Hilary Term, there was a verdict for the plaintiff, damages £50, subject to the opinion of the court upon the following case:—

The plaintiff and defendant, at the time of drawing the bill in question, resided at Hexham. The defendant, who was a tanner, was also agent of the Durham bank, in which capacity he acted from July, 1812, to July, 1815, when the bank failed. On the 8th of June, 1815, the plaintiff sent £50 to the house of the defendant, in order to procure a bill upon London for the amount, and the defendant filled up and signed the bill in question upon one of the printed forms of the Durham bank, and sent it to the plaintiff. The following is a copy of the bill:—

“N. G. 205.  
£50.

*Hexham, June, 8, 1815.*

Forty days after date, pay to the order of Mr. Thomas Leadbitter fifty pounds, value received, which place to the account of the Durham bank, as advised.

“Messrs. Wetherell, Stokes, Mowbray, Hollingsworth, and Co., bankers, London.

(Signed)           CHRISTR. FARROW.”

The persons who constitute the firm upon which the bill was drawn, are the same who constitute the firm of the Durham bank, that bank having a house in London, upon which they were in the habit of drawing bills, which they wished to make payable there.

[\*225] \*The bill in question was drawn in the same form as had been used by the defendant since June, 1813, before which time he had been in the course of issuing bills drawn in the name of one of the partners of the Durham bank. He did not draw bills on his own account in this form, nor upon the same parties. The plaintiff, when he sent the £50, and obtained the bill, knew that the defendant was agent of the Durham bank at Hexham, and that the Durham bank drew upon a house in London, and he supposed that the bill was given by the defendant as agent, and on account of the Durham bank, to which the defendant paid over the £50. The bill when due, was presented to the drawees, and payment refused, and due notice was given to the defendant.

The question for the opinion of the court was, Whether the plaintiff was entitled to recover.

*Tindal*, for the plaintiff, argued that the defendant was liable, there

being nothing on the face of the bill to show that it was drawn by him as an agent who was acting only for his principal. The defendant, in order to protect himself, should have expressed on the bill, that he drew it as agent only, or by procuration; or at least that it was for the Durham bank; for the expression, "to be placed to the account of the Durham bank as advised," imports nothing more than that the drawer had a credit with the Durham bank to the amount, and that the drawees were to look to that credit. So, where a bill was addressed to the drawee as cashier of the York Building's Company, at their house, and was accepted by him generally, it was held that he was personally answerable notwithstanding the bill was addressed to him in a limited character. *Thomas v. Bishop*, Str. 955. As to the plaintiff's knowledge that the defendant was only an agent, it is to be recollected that this is a contract in writing, founded on the custom of merchants, which cannot be varied by matter lying in parole *dehors* the instrument. *Thomas v. Bishop*, Str. 955. Therefore, upon a policy of assurance from Archangel to Leghorn, where the defendant sought to show by parole that the risk was to commence only from the Downs, it was pronounced by Pemberton, C. J., "That a merchant should no more be allowed to go from what \*he had subscribed in a policy, than he that subscribes a [\*226] bill of exchange payable at such a day shall be allowed to go from it, and say it was agreed to be on condition," &c. *Kaimes v. Knightley*, Skinn. 54. And surely the defendant cannot go from that which he has here subscribed in a more important particular than if he be allowed to say that the plaintiff knew him to be an agent only, and therefore he is not answerable. Besides, it does not follow, because the plaintiff knew him to be an agent, that the defendant is, therefore, exempted from personal liability. Contracts are frequently made by persons who are known to be agents, yet are personally liable. *Appleton v. Binks*, 5 East, 148; *Le Fevre v. Loyd*, 5 Taunt. 749. The defendant, therefore, in order to exempt himself, ought to show, not only that the plaintiff knew him to be an agent, but that he also understood that the defendant was not to be answerable *ultra*; whereas the contrary is apparent from the case; for if the defendant be not liable no one else is: the drawees are not, for they have not accepted; nor the Durham bank, for there is nothing in writing to bind them; and as the Durham bank and drawees were identified, it may well be intended that a second name was added as drawer, to give the bill additional currency.

*Scarlett*, contra, endeavoured to distinguish the cases cited for the plaintiff. As to *Thomas v. Bishop*, he observed, that the plaintiff had no knowledge of any agency, except as far as it might be inferred from the bill's being addressed to the drawee as cashier, which the court considered as only descriptive of the party; for, though a cashier, he might well accept on his own account; and the rest was merely local reference: but it is remarkable that the court, upon that occasion, referring, to a case in Carth., took the present distinction, saying, "It might have been otherwise if the action had been by J. S. who was privy." And what was there said as to the non-admissibility of matter *dehors* the writing, was said only as it regarded any matter to charge third persons,

*i. e.*, the York Building's Company. But it is the daily practice to admit evidence explanatory of written contracts, in order to show the real nature of the transaction; as that a bill of exchange was drawn for [\*227] \*accommodation, or by a servant only. With respect to the personal liability of agents, upon contracts in which they are known to act as agents, it is observable, of the two authorities quoted in favour of this position, that in one the plaintiff had no knowledge that the defendant drew the bill as agent; and the other was a case of covenant. And as to the argument for the necessity of this defendant's liability, drawn from the supposed irresponsibility of any other party, it may be answered, that the Durham bank is liable, in the same manner as ship-owners are liable upon a charter-party, not under seal, executed by the master on their behalf.

LORD ELLENBOROUGH, C. J.—Is it not an universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another, or by procuration of another, which are words of exclusion? Unless he says plainly, “I am the mere scribe,” he becomes liable. Now, in the present case, although the plaintiff knew the defendant to be agent to the Durham bank, he might not know but that he meant to offer his own responsibility. Every person, it is to be presumed, who takes a bill of the drawer, expects that his responsibility is to be pledged to its being accepted. Giving full effect to the circumstance that the plaintiff knew the defendant to be agent, still the defendant is liable, like any other drawer who puts his name to a bill without denoting that he does it in the character of procurator. The defendant has not so done, and therefore has made himself liable. I do not say whether an action would lie against the Durham bank, because, considering it in either way, it would not, as it seems to me, affect the liability of the defendant.

BAYLEY, J.—I am entirely of the same opinion. The drawer, by the act of drawing, pledges his name to the bill's being duly honoured; and though the plaintiff in this case knew that the defendant was an agent, he might also know that he had given this pledge.

ABBOTT, J.—I am also of the same opinion. The party does [\*228] \*not show that the bill was not taken according to the effect which it bears on the face of it.

HOLROYD, J.—I apprehend that no action would lie on the bill, except against those who are the parties to it.

Judgment for the plaintiff.

## II.—WOODSIDE v. CUTHBERTSON.

Feb. 4, 1848.—S. 10 D. 604.

A SUBMISSION was entered into, in January, 1847, between Thomas Gardner, builder in Glasgow, and Robert Cuthbertson, manufacturer, Dunfermline, “as acting and taking burden on him for Robert Henderson Robertson,” Merchant in London, and manufacturer in Dunfermline. The submission set forth that Gardner and R. H. Robertson and Com-

pany (of which firm Robertson was sole partner) had entered into a contract, by which the former had become bound to erect a fire-proof spinning-mill and chimney-stalk, and to finish an engine-house, at the Baldridge Works, Dunfermline; and that Gardner, after commencing the work, having found it inconvenient to complete it, had agreed to give up the contract, "on condition that he, the said R. H. Robertson, should agree to pay the said Thomas Gardner, or such of his creditors as might have legal right thereto, any difference which there might be found to be between the amount of the sums already paid to him by the said R. H. Robertson and Company, or R. H. Robertson, to account of the contract price, and the amount or value of the works already performed by the said Thomas Gardner, and of the materials belonging to him upon the ground."

The deed then submitted to the decision of John McElroy, building inspector, Glasgow, the questions of the value of the work which had been performed by Gardner, and the value of the materials belonging to him on the ground; and also, whether he was in the circumstances entitled to receive payment of the difference between the amount of their values and \*the sums already paid to him on account of the contract. [\*229] The submission then proceeded,—“And whatever the said arbiter shall determine in the premises between and the day of February next, or betwixt and any farther day, not exceeding in all six weeks from this date, to which, and no longer, this submission may be prorogued; the said Thomas Gardner, and Robert Cuthbertson, as taking burden on him for the said Robert Henderson Robertson and Company, and Robert Henderson Robertson, hereby bind and oblige themselves, their heirs, executors, and successors, to abide by, implement, and fulfil to each other, under the penalty of £100 sterling, to be paid by the party failing to the party observing, or willing to observe the same, over and above performance.”

It was further set forth in the deed, that Gardner had withdrawn a note of suspension and interdict, which had been presented by him against Robertson, connected with the contract.

The arbiter pronounced a decree-arbital, by which he found that a balance of £350 was due to Gardner. The decree-arbital proceeded—“And I decern and ordain the party submitter, Robert Cuthbertson, to make payment to the said David Jenkins, as interim-factor (on Gardner's sequestrated estate,) of the said sum of £350, 14s. 6½d., with the legal interest thereof from the date hereof, till payment: And farther, I find the said Robert Cuthbertson and David Jenkins liable each in one half of the account of the said John Burnet, clerk to the submission, including the expense of this decree-arbital; and I decern and ordain them, jointly and severally, to make payment thereof, amounting to the sum of £12, 11s. 7d., &c.: And on the said Robert Cuthbertson, acting on behalf of the said Robert Henderson Robertson, implementing this decree, I declare him and his said constituent freed and discharged of all claims at the instance of the said Thomas Gardner or his creditors,” &c.

The affairs of R. H. Robertson and Company having become insolvent, Archibald Woodside, trustee on Gardner's estate, raised action against  
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Cuthbertson, and also against Robertson, setting forth that Cuthbertson, as well as Robertson, was bound by the obligation undertaken by him to implement the terms of, and pay to the pursuer the several sums specified [\*230] in, and \*found due by the decree-arbitral; and concluding for payment accordingly.

*Cuthbertson pleaded*;—That he was not liable under the decree-arbitral. On the face of the submission, it was Mr. Robertson who was the party submitter, while the defender merely acted for him, in entering into the formal deed. His doing so implied that he became bound to the other party that Robertson agreed to the submission, as the mode in which Gardner's claims should be adjusted. And it was not said that Robertson had in any way repudiated this act on his behalf, but, on the contrary, held the arbiter's award as binding and conclusive. The terms in which the defender became a party to the submission did not import a responsibility for the amount that might be awarded under it. It would require a very stringent form of expression to make a party who professed only to bind another bind himself also. It was therefore *ultra vires* of the arbiter to pronounce any decerniture against the defender. *Livingstone*, Feb. 23, 1830, 8 S. and D. 594; *Maxton v. McIntosh*, Jan. 7, 1777, M. 2133.

*The Pursuer pleaded*;—That Cuthbertson had bound himself as a party to the submission. He professed not only to act for Robertson, but also to "take burden" on himself for him. These words could not be regarded as mere tautology, but had a plain and obvious meaning attached to them. He signed the deed not per procurator of Robertson, or as authorized by him, but simply with his own name; and further, he bound himself, his heirs, executors, and successors. This form of expression, taking also into consideration that the party for whom he was interested was not resident in Scotland, imported his having taken the counterpart obligation to Gardner in the submission upon himself.

The LORD ORDINARY pronounced this interlocutor:—"Finds that the deed of submission libelled on was entered into 'between the pursuer, on the one part, and Robert Cuthbertson, manufacturer, Dunfermline, as acting and taking burden on him for Robert Henderson Robertson, merchant in London, \*and manufacturer in Dunfermline (who was [\*231] sole member of the late firm of Robert Henderson Robertson and Company, manufacturers and mill-spinners in Dunfermline,)' on the other part: Finds that the said deed narrates a contract between the pursuer and the said company, by which the former became bound to erect a fire-proof spinning-mill and chimney-stalk; and that, after carrying on the work to some extent, the parties agreed to relinquish the contract, and to refer to the arbiter named, under certain conditions,—1st, To fix the value of the work done, and of the materials on the ground; and 2d, Whether the pursuer was to receive the difference betwixt these values, and the sums paid to him, or any part thereof? And the deed further bears, that 'whatever the arbiter should determine, the said Thomas Gardner, and Robert Cuthbertson, as taking burden on him for the said Robert Henderson Robertson and Company, and Robert Henderson Robertson, hereby bind and oblige themselves, their heirs, executors, and

successors, to abide by, implement, and fulfil to each other :’ Finds that the deed of submission thus discloses on the face of it, that the furnishings had been made on behalf of the said company, and not on behalf of the defender, as an individual : Finds that, by the decree-arbitral, the arbiter fixed the value of the work performed at £1049, 10s. 3d., and of the materials on the ground at £73, 7s. 8d., making together £1122, 17s. 11d. ; and the difference between this and the sums paid under deduction,—‘ 1st, Due by the said Thomas Gardner to the other party submitter, an account for cartage, and for timber produced to me, amounting to £28, 10s. 8d. ; 2d, Various allowances ascertained and fixed by me, for insufficient or defective work, the sum of £133, 12s. 8½d. ; and 3d, £60, being the sum to which I have modified the said Robert Henderson Robertson’s claims for damages, suffered from the said Thomas Gardner’s delay in proceeding with the work, I being satisfied that the said delay was to some extent caused by Mr. Robertson himself, or those acting for him,—making together the said three sums, the sum of £222, 3s. 4½d., which being deducted from the aforesaid sum of £572, 17s. 11d., leaves a balance of £350, 14s. 6½d. due to the said Thomas Gardner’s creditors ; and I decern and \*ordain the party [\*232] submitter, Robert Cuthbertson, to make payment to the said David Jenkins, as interim factor aforesaid, of the said sum of £350, 14s. 6½d., with the legal interest thereof, from the date hereof, till payment :’ Finds that the said decree-arbitral was not pronounced in conformity to the submission, and specially was not pronounced against the said Robert Cuthbertson, as acting and taking burden on him for Robert Henderson Robertson, but was pronounced against him as an individual only, and therefore was not warranted, either by the precise terms of the said submission, or by the real nature of the transaction, as thereby disclosed : Finds that the present action expressly libels, that ‘ the said Robert Cuthbertson, defender, is bound by the obligations undertaken by him, to implement the terms of, and pay to the pursuer, as trustee aforesaid, the several sums specified in, and found due by the decree-arbitral before narrated, as well as the said Robert Henderson Robertson and Company, and Robert Henderson Robertson, the only individual partner of said company, who are made parties hereto for their interest ;’ and therefore concludes both against Cuthbertson, as an individual, and Robert Henderson Robertson and Company, and Robert Henderson Robertson, for implement of the said decree-arbitral : Finds that there is nothing in the submission and decree-arbitral to warrant such distinct and separate liability ; and therefore sustains the defences, assoilzies the defender, and decerns : Finds the pursuer liable in expenses.”

In a note his lordship observed,—“ The decree-arbitral ought to have been pronounced against the party in the precise character in which he entered into the submission. Now, the defender did not enter into this submission as an individual, but as acting and taking burden for Robertson. Whatever the extent of the legal responsibility incurred by such a submission might have been, the award should have been in conformity to the submission.

“ But, secondly, considering what is disclosed on the face of the deed

of submission itself, the work having been done entirely for Robertson and Company, and Cuthbertson only acting and taking burden on himself as an agent whose principal was \*disclosed, (he himself having no personal and individual position in the matter,) there seems no ground in law for holding him either primarily responsible, or responsible as cautioner. The decree-arbital should have been in terms of the submission, and then the debt being constituted, action would have been against Robertson, whose debt this truly was. The case of *Maxton v. Mackintosh*, 7th January, 1777, *Morrison*, 2133, referred to by the defender, strongly confirms this view, as to the meaning of the words 'taking burden.'"

The pursuer having reclaimed, the court altered, and decerned in favour of the pursuer.

**LORD JUSTICE-CLERK.**—This is a short point, but an important one. The party on whose estate the reclamer is trustee, enters into a submission with a party in Dunfermline, in regard to a dispute, the object of which is immaterial, with a party resident out of Scotland, with whom the party in Dunfermline was closely connected in business.

The object of the submission was to come to an immediate arrangement; an interdict was to be withdrawn, and certain valuable materials to be surrendered and given up for the use of the party in England. No one can doubt that Gardner, on entering into this submission, must have believed that it was the same thing as if Robertson had been in Scotland, and a party to the submission. But the latter was not so; and hence the object plainly was to place Gardner in the same situation as if he had been in Scotland. What are the terms of the submission?—**[Reads.]**

Cuthbertson does not bind Robertson, or profess to bind him, as a party to the deed; but, as taking burden on him for Robertson, he binds himself. Now, unless the contrary appears, from the deed in which a party so interposes and binds himself, to have been the true extent of the undertaking, according to the understanding of parties, I am clearly of opinion, that by these terms, "taking burden on him for A. B., and binding himself" by the form and style of the obligation, the party is taken bound to fulfil the deed, whatever it may be,—submission, contract, sale, [\*234] lease, &c. I know of no other terms \*so appropriate and so directly applicable as those in this deed. They are the proper and accustomed words of style, known to us all as inveterate in usage and practice. No doubt it does not follow, that in every case these terms must receive that effect. The deed may contain other terms which directly qualify them, or may prove that the true understanding and arrangement of parties was different; and that the party only became bound, that the absent party for whom he acted and interposed, should acknowledge himself to be bound. That is quite true. But I think it lies on the party who takes burden for another, and binds himself to show that from the rest of the deed.

But so far from the rest of the deed so explaining and qualifying the natural and legal import of the above terms, it proves the reverse. It shows that, in consideration, and as a counterpart of the immediate re-



nunciation, a party was to be bound to Gardner, and it takes Cuthbertson bound to abide by, implement, and fulfil the award.

How, then, can I find that Cuthbertson is not bound to abide by, implement, and fulfil the award, when he so binds himself and his heirs? The decree is, therefore, directly in terms of the submission; and the action is in terms of the express unqualified direct personal obligation on Cuthbertson.

The case of M'Intosh at least found him liable; it is said on a wrong ground; if so, then it is no authority either way. But really the question is one of plain direct personal obligation.

LORD MEDWYN.—I entirely concur. Although I am aware that Robertson is not to be looked upon exactly as a foreigner for whom a party in this country takes burden on himself,—but still, though carrying on a manufactory here, he was a merchant in London, residing there, and having matters to settle with the pursuer; Cuthbertson acts for him, and accepts of certain terms of settlement on his part, the exact amount to be settled by arbitration, and, on the other hand, the pursuer withdraws a suspension he had presented. A submission is then made out between the pursuer and the defender, as acting and taking burden on him for Robertson. Now, I am very clear that the agent here, for a principal disclosed in the deed, \*though he takes burden for him, only [\*235] binds himself that the principal shall abide by the submission, and not repudiate the proceedings, as in the case of Livingstone in 1730; and also so found in M'Intosh in 1777, till the judgment went on a letter subsequently produced, which the court seems to have considered as giving the true meaning of the parties at the time of entering into the guarantee, and the true character of the burdens. But the submission does not proceed on the part of the defender, with no higher obligation against him; but in the obligation clause he goes beyond his character of agent binding his principal merely to be a party to the submission, for it is in these terms:—"And whatever the said articles," &c. —[Reads clause given supra.] Implement and fulfil, I think, goes much beyond *abide by*, which words also are used, and I think must mean, that whether Robertson repudiates it or not, Cuthbertson is to see it implemented and fulfilled,—so that if Robertson does not, he must do it; and I am entitled to hold that the pursuer would not have agreed to the various conditions on his part, and the withdrawal of the suspension, without this binding of Cuthbertson. As I read the submission, the term "parties submitters," in the submitting clause, means Gardner and Cuthbertson individually, who subscribe it for Robertson no doubt, but followed by this personal obligation, to implement what shall be the award. In that view, the award being made out against "the party submitter, Robert Cuthbertson," is correct, and is not inconsistent with the submission. The arbiter plainly put that construction on the terms of the award; and, therefore, I think Cuthbertson must do more in implement of his submission than get Robertson to abide by it.

LORD MONCREIFF.—I am of the same opinion. I think that the material question in this case is attended with some doubt. But I am rather inclined to differ from the lord ordinary, and to hold that the

defender is personally bound to give implement of the decret-arbitral, or to see it implemented by Robertson. I see no difficulty in the form of the decree, or at least no objection of which the defender is entitled to avail himself. The decree is given against him as the party submitter, \*which he certainly is; and if the bond or submission is such [\*236] as to render him liable to such a decree in his own person, I do not see how he can object to the decree actually pronounced.

What, then, is the obligation which is undertaken by the submission? The party who was under an obligation by the contract which was the subject of discussion was not resident in Scotland, but in London; for, though there was a nominal company in Dunfermline, Robertson, who resided in London, was the sole partner of it. Then, when the matter was to be submitted to arbitration, how was that to be done? It appears to me, that it required a person in Scotland willing to undertake the whole responsibility. A gentleman might, indeed, have agreed to sign the submission merely as agent for another, undertaking merely that his principal should be answerable. But I do not think that this is the nature of the obligation in the present case.

The submission is so framed, that while, on the one hand, Cuthbertson, as the party submitter with Gardner, does not directly bind either Robertson and company, or Robert Henderson Robertson individually, on the other, he becomes a party to it, not simply as acting for or as the agent of those parties, but specifically as acting for "and taking burden on him for Robert Henderson Robertson." And then the deed bears, that "whatever the said arbiter shall determine" (within six weeks from the date,) "the said Thomas Gardner, and Robert Cuthbertson, as taking burden on him for the said Robert Henderson Robertson and company, and Robert Henderson Robertson, hereby bind and oblige themselves, their heirs, executors, and successors, to abide by, implement, and fulfil to each other," under a penalty, &c.

According to the most obvious meaning of these terms, Mr. Cuthbertson undertakes, singly and solely, the whole burden of giving implement of whatever the arbiter should determine by his decree. He does not merely bind himself that Robertson shall recognise and adopt the arbitration. His engagement is absolute, that he takes on himself the burden of fulfilling whatever the arbiter shall award, whether Robertson shall acknowledge it or not. No doubt, it is for or on account of Robertson \*that he so undertakes; and if Robertson authorized or sanc- [\*237] tioned this, he would be liable to relieve him, and might, perhaps, be also directly liable to Gardner. But still the direct obligation is by Cuthbertson, for himself and his own heirs, executors, and successors. And on the faith of this alone Gardner withdrew his action and his interdict, and gave up whatever securities he held.

No authority has been referred to, at all sufficient to sanction the proposition, than an obligation in such terms as those which here occur infers no personal liability; and I think it exceedingly improbable that, in the circumstances, the other party would have entered into the submission in any other terms, or on any other footing.

The case of *Maxton v. M'Intosh*, January 17, 1777, seems to me to

give no aid to the defender. By the actual decision, Mr. M'Intosh, who in a bond had taken burden on him for his brother, was found personally bound; and though a letter, in certain terms, was founded on in the reclaiming petition, the cause was brought under review on its whole merits; and it seems to me not to be at all admissible to assume, that the court would, on such a letter, have changed the terms of the bond, and not decided on the bond as it stood.

In the case of Livingstone, February 23, 1830, the undertaking was quite different:—"We, as agents, hereby oblige our respective constituents to abide by whatever award the arbiter may pronounce," &c. If the constituent had, in that case, recognised or adopted the arbitration, the agents' only obligation would have been fully satisfied. But the undertaking, in this case, is very different, the party here taking on himself all the burden of giving actual implement of any decree to be pronounced.

Lord COCKBURN.—I am of the same opinion. I go entirely on the words in the binding clause, by which the defender binds himself, his heirs, executors, and successors, to implement the decree-arbitral.

The court accordingly altered the interlocutor of the lord ordinary, and decerned for the sums in the decree-arbitral.

\*III.—WEBSTER v. M'CALMAN. [238]

June 3, 1848.—S. 10 D. 1133.

WILLIAM WEBSTER, farmer in Islay, granted to John M'Calman, merchant in Tarbert, an acceptance in the following terms:—"Glasgow, 8th November, 1847.—£200 sterling.—Three months after date pay to me or order, at 33, Buchanan Street, Glasgow, the sum of two hundred pounds sterling, for behoof of W. F. Campbell, Esq., of Islay, for value received in meal." (Signed) "John M'Calman." Accepted, "W. Webster." Addressed, "To Mr. William Webster, at Mr. John Lamont's, 33 Buchanan Street, Glasgow."

Webster had acted occasionally as factor for Mr. W. F. Campbell of Islay. Some time previously he had received from M'Calman, (it was averred,) on account of Mr. Campbell, various quantities of meal and other goods, amounting to £327. An account of these goods had been rendered by M'Calman, in the name of Mr. Campbell, in which they were stated to the debit of Campbell. In answer to a letter by M'Calman, inclosing to Webster a promissory note for acceptance, in payment of the amount of these goods, a letter in the following terms was (July 15, 1847,) returned by Webster:—"I received yours of the 8th, with a bill enclosed for £300 at four months. I have not yet signed it, but should I do, it is upon this understanding, that you renew the whole, or any part of it that I may require, for I am quite at a loss what to say about those times. Put at the end of the bill, on account or for behoof of W.

F. C." The note was thereafter returned accepted. It bore that Webster promised to pay £300 "for value received on account of W. F. Campbell."

Some time before this bill fell due, Webster requested M'Calman to renew it to the extent of £200 at three months' date, he promising to pay £100 and £4 for discount, in cash. Accordingly Webster thereafter addressed the following letter, enclosing the bill first above quoted:—"I now inclose the bill for £200, and asked my brother to send you to-day £104,—this will lift the bill for £300. You will likely have heard that our matters have got confused a little,—however, I have kept my promise."

[\*239] \*About this time Mr. Campbell of Islay had become insolvent, and was subsequently sequestrated.

M'Calman having charged upon the bill, Webster presented a note of suspension.

The lord ordinary reported the case, stating in a note, "As both parties refer to a case now in dependence before the second division of the court, the lord ordinary has thought it the most convenient course to report the present case."

*The Suspender Pleaded*;—That he was in the custom of acting as an occasional factor for Mr. Campbell of Islay, and it was in that capacity that he had ordered the goods, for which the bills in question were granted. These goods were for Mr. Campbell's behoof; they were furnished by the charger on his credit, and in the account which he had given in they were correctly placed by him to his debit. It was not intended that the suspender's credit should be pledged for these furnishings, as the terms in which both these bills were conceived, showed. On the contrary, the transaction that took place was merely this, that the suspender's acceptance, as factor, was given for his constituent's debts, while that constituent himself was known and looked to by the charger as the proper debtor, and was named as such in the bills. The case was not complicated by any question with an onerous indorsee,—the question arose solely between the suspender and the charger, to whom the bill had been granted, and who was perfectly aware of the true character of the debt; that it was a debt of Islay's alone, with which the factor personally had no concern. The suspender was more favourably situated in the present case than in the analogous case of *Cheine*, referred to by the lord ordinary, where the question had occurred between the factor and the Western Bank, an onerous indorsee. *Affleck v. Williamson*, Feb. 25, 1776, M. App. voce "Writ," No. 1.

It was farther contended that the case should be sisted to await the decision of the court in that case.

*The Charger Pleaded*;—That the point which occasioned difficulty to the court in the case of *Cheine*, viz., whether the \*bill was not [\*240] to be held as having been made payable out of the rents of Mr. Campbell's estate, a fund that might or might not have existence, did not occur here, and there was no similarity between the cases. Here there was a personal liability undertaken by the suspender for the debt. The charger could not do diligence against Mr. Campbell for it, nor

would he be entitled, without further inquiry, to have it constituted as a debt against his estate.

LORD JUSTICE-CLERK.—This case has no analogy to that of *Cheine*.

The question is simply—Did the suspender pledge his credit by this bill, and undertake a proper personal obligation to be liquidated without reference to the funds of Mr. Campbell of Islay?

That the debt may also be due by and recoverable from that gentleman, and that it arose out of transactions for his behoof, is not enough to limit the effect of the terms of a promissory-note or bill otherwise absolute and in proper form, and the obligation thereby contracted—else all bills, without exception, granted by one man in the transactions of another, would be at once useless—being not documents of debt against the latter on the one hand, and not recoverable against the former on the other: they would be useless—of no more value than an acknowledgment that goods were furnished to a certain amount.

Nor is it of itself of any importance that the creditor knew that the granter of the bill was an agent or factor, overseer or manager, for another, and originally furnished the goods on the credit of that other. Of so little importance is this in support of the point argued by the suspender, that the result in many cases will be, that by taking the bill of one whom he knew to be agent, factor, or so forth, without the authority of the principal, direct or implied, and without knowing how the latter settled with his agent, he, the creditor, may be held to have elected to take the agent on his personal credit for payment, and so may lose recourse against the principal.

In truth the state of things here is not favourable for either creditor or debtor. A person furnishes goods on account of a proprietor without communication with the proprietor, or \*knowing whether he has [\*241] put his factor in funds to pay or not. He takes after some time a promissory-note from the factor, under promise to renew; then gets payment of a portion of the note by the agent as from himself, and takes another bill for the remainder. In most of such cases the bills are as much for the accommodation of the factor, and known to the creditor to be so, as for the principal, and enable the factor to use, in the meantime, the money of his employer in his own matters, keeping up credit for what he ought to have paid.

Both documents of debt in this case, show plainly that the factor did pledge his own personal credit, and intended to do so.

The first is a promissory-note—I promise to pay £300—value received, and it is added, on account of W. F. Campbell of Islay. And he had directed that or some equivalent expression to be added. This marked that the value had been received for Mr. Campbell, and therefore that the bill when paid was on account of the latter, and so could be entered in settlement with him without the appearance of mixing up his own bills with the transactions of the latter. But, though he thus notes the fact that the value received—the value he had in hand—was for behoof of Mr. Campbell, he grants his own obligation to pay the amount of value received. Now, is that incompetent? That, of course, cannot be pretended. A factor may grant such a bill to the effect of

himself incurring a personal obligation. Now, here it is a personal obligation to pay for value received, though that value had been received for another. Then the next document is the bill for £200, in renewal in part of the promissory-note, £100 being paid. The suspender's own letter would bar his plea, even if the bill were ambiguously framed. That letter shows that he was personally to pay—that he had undertaken to do so, whatever were the funds of Islay's in his hands,—and that he was bound, notwithstanding Islay's embarrassments.

Accordingly, he sends £100, “though our matter have got confused a little”—alluding to the rumors of Islay's embarrassments—“but I have kept my promise”—that was, to pay the part: Then he grants his bill for the remainder. Is not that precisely a promise to pay that balance? That is the \*exact and literal import of the document. [\*242] True, he still marks that he is to pay for behoof of W. F. Campbell of Islay; but that does not exclude his personal undertaking, or establish that his personal credit was not pledged for payment.

Thus the bill charged on has in substance and form the first and main quality of a bill of exchange, viz., that it pledges in all events the personal credit of the acceptor to the undertaking to pay. If it had not been in this respect a proper bill of exchange, and if *in gremio* it had contained what proved that the personal credit of the acceptor was not pledged, then it would have made no difference that the bill had been in the hands of a party who gave value for it from a mistake as to its character.

In truth, the only question which can be raised is one of a very opposite description, viz., whether if the suspender is unable to pay, the creditor can now proceed against the funds of Mr. Campbell of Islay, or has not taken the agent as his debtor, and liberated the funds of the principal? But that point we have no occasion to consider.

LORD MEDWYN.—When one person orders goods for another, whether that circumstance is disclosed or not to the furnisher, if he does not mean to bind himself but only his constituent, he should take care that this is distinctly notified and acquiesced in; above all, he should be cautious in granting any bill for the amount. It is scarcely possible to qualify a bill upon him so as to relieve himself, as here the constituent does not pay it. It may be true the articles here were for Islay; the charger may have believed this, but he had only the suspender's word for it. Islay himself did not order them, nor authorize him to charge him with them. No doubt he made out the account in Islay's name, but still only at the suspender's request; but the bill for them is granted by the suspender in his own name. Now, whether we look at the original bill or the renewed one, since Islay had not paid for the goods furnished, I can see no ground for liberating the suspender. The original obligation was a promissory-note—“I promise to pay for value received on account of W. F. Campbell.” But this description of value does not affect the obligation as between the granter and the payee, for still the [\*243] grantor promises to pay. It is only inserted \*at the instance of the acceptor, to show that on payment he will claim this as an item in his account with Islay, on showing that the goods were furnished

and applied for the use of Islay. The renewed bill can afford as little ground for the acceptor being freed from responsibility. He accepts a bill addressed to him as an individual, with this explanation, it is true, "for behoof of W. F. Campbell, Esq., of Islay, for value received in meal." This admits that he received value from the drawer in meal, which is the fact: it bears to have been on account of another; that may have been the fact too; but so far as this bill is concerned and to be operated on, the drawer has no concern with this; that concerns only the acceptor and the persons for whom he says he was acting in the transaction, and to make his relief more easy, after he has fulfilled his obligation and intention to the party with whom he dealt, if the fact inserted on his authority above be true as stated.

If it were necessary to show the suspender's own belief that he was personally liable to the charger for the goods commissioned by him, I might notice that after Islay's bankruptcy the bill charged on was granted by the suspender binding himself individually to pay. But it is not necessary to found on this. As to the case of *Cheine* I need only say this, that the circumstances of the two are widely different, and that the reason of suspension might be sustained there with perfect consistency with the opposite judgment here.

**LORD MONCREIFF.**—I am exactly of your lordship's opinion, and I think we must clearly refuse this note. I have looked at my notes in *Cheine's* case, and I am satisfied that this case is quite different. The goods here were furnished directly to the suspender, and a transaction took place by which a part of the sum in the bill was paid, and a renewal obtained at his request. I think it was the suspender's personal obligation that was given for the goods, and was accepted by the charger.

**LORD COCKBURN.**—I am of the same opinion.

The court then pronounced an interlocutor remitting to the lord ordinary to refuse the note of suspension, with expenses.

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\* 1. In the case of *Cheine v. The Western Bank of Scotland*, July, [\*244] 20, 1848, a bill was drawn by the law agents of Mr. Campbell of Islay upon his factor, for £1500, which was stated to be "value in account with W. F. Campbell, Esq. of Islay." The bill was addressed to the factor, who was designated "Factor of Islay," and was accepted by him. The bill was discounted by the law agents with the Western Bank, where he kept an account, and the proceeds were put in his books to Mr. Campbell's credit. In a suspension of a threatened charge at the instance of the bank the factor pleaded that he had accepted the bill in his factorial capacity, and that on discounting the bill the bank did not rely on his personal credit, and that the relation in which he and the law agent stood to Mr. Campbell was well known to the bank. He farther *pleaded*, that the terms in which the bill was addressed to him as factor of Islay were descriptive of the capacity in which he was desired to accept the bill, and was not intended to denote him as an individual, and that if he was called to accept only in the capacity of factor or agent, no personal liability was thereby imposed upon him. He farther *pleaded*, that the character in which the bill was accepted was farther made plain by the words "value in account with W. F. Campbell, Esq. of Islay," these words importing that the value in account was between the drawer and Mr. Campbell, whose factor the complainer was,

and out of whose funds he was required to pay. The lord ordinary decerned against the factor, and he having reclaimed, and the second division of the court being equally divided in opinion, the opinion of the whole court was taken. The consulted judges were unanimously of opinion that the lord ordinary's interlocutor should be adhered to, on the ground that the acceptance was to be held not as the acceptance of Mr. Campbell of Islay, subscribing and binding himself through the medium of his factor, but as the individual acceptance of the factor, and so attaching liability to him alone in his own proper person.

2. The case of *Thomas v. Bishop*, 2 Strange, 955, resembles that of *Cheine v. The Western Bank*. The plaintiffs were indorsees of a bill of exchange drawn in Scotland upon the defendant, in these words, "At thirty days sight pay to J. S. or order £200 value received of him, and place the same to account of the York Buildings Company, as per advice from Charles Mildmay. To Mr. Humphrey Bishop, cashier of the York Buildings Company, at their house in Winchester Street, London. Accepted 13th June, 1732, per H. Bishop." The bill not being paid, an action was brought against the defendant upon his acceptance. The defendant proved, that the letter of advice was addressed to the company; and that the bill being brought to their house, he was ordered to accept it, which he did in the same manner as he had accepted other bills. But [\*245] Mr. Justice \*Page, who tried the cause, directed the jury to find for the plaintiff, which they did accordingly. Upon motion for a new trial, the court held, that the direction was right, on the ground that the bill on the face of it imported to be drawn upon the defendant, and being accepted by him generally, and not as servant to the company, to whose account he had no right to charge it till actual payment by himself. And this being an action by an indorsee, it was thought that it would be of dangerous consequence to trade, to admit of evidence arising from extrinsic circumstances, as the letter of advice.

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WHERE AN AGENT CONTRACTS IN SUCH A FORM AS TO MAKE HIMSELF PERSONALLY RESPONSIBLE, HE CANNOT AFTERWARDS RELIEVE HIMSELF FROM THE RESPONSIBILITY, WHETHER HIS PRINCIPAL WAS OR WAS NOT KNOWN AT THE TIME OF THE CONTRACT.

### JONES v. LITTLEDALE.

April 19, 1837.—E. 6 Ad. & Ell. 486. Eng. Com. Law Reps., vol. 33.

ASSUMPSIT for not delivering a quantity of hemp, alleged to have been bought by the plaintiff of the defendants, at the price of £155, 14s. 11d. There was also a count for money had and received, and on an account stated. The defendants pleaded to the first count, and all but £52 in the second count, *non assumpsērunt*; and as to that £52 a tender. The particulars of demand claimed £155, 14s. 11d.

On the trial before Patteson, J., at the last Liverpool assizes, it appeared that the plaintiff had (in 1836) bought by auction, at the rooms of the defendants, who were brokers at Liverpool, the hemp in question, to be paid for at certain times then agreed on: that the defendants afterwards sent an invoice of the goods, headed,—



“ — Jones,

Bought of J. and H. Littledale,

Sixty-four bales of hemp. Payment fourteen days and six months.  
Received on account £100; October 31.

Settled November 26.”

(Signed by defendants’ clerk.)

\*That the plaintiff, on the 31st of October, paid the defendants £100, and afterwards, on the 26th of November, the residue, [\*246] £52; and on the latter day asked for a delivery order. An order on Messrs. Coupland and Duncan was given him, which on presentation the same day was refused; and one of the defendants, being applied to, said that he would see his attorney, and procure the delivery; but the defendants never did procure the delivery. In answer, the defendants offered to prove that the hemp was advertised in two newspapers, which the plaintiff was in the habit of seeing, for sale at the rooms of the defendants, brokers, with a reference to Coupland and Duncan, merchants. That it was sold by auction at the defendants’ rooms, under printed conditions of sale, describing the defendants as the seller’s brokers, but not mentioning the name of the seller: that the defendants had made advances to Messrs. Coupland and Duncan on these and other goods; and that the custom at Liverpool was for brokers, when they had made advances to deliver invoices in their own names, in order to secure the passing of the purchase-money through their hands: That Messrs. Coupland and Duncan became bankrupts, and that a fiat issued on the 25th of November. The learned judge thought that these facts, if proved, constituted no defence to the action, and directed a verdict for the plaintiff.

*Creswell* now moved for a rule to show cause why there should not be a new trial, on the ground of misdirection. The evidence which it was proposed to offer would have been a good defence, and should have gone to the jury. If the plaintiff knew that the defendants were selling for Coupland and Duncan, he has no right to recover against the defendants. This was a sale by brokers for a declared principal; the terms of the invoice could not alter the contract entered into by that sale. The invoice is not the contract. [COLERIDGE, J.—Do not the brokers, by such a dealing as this, undertake that they have a right to deliver?] If they do, and have not the right, they may be liable on a declaration adapted to those circumstances. Had the plaintiff here made his payment at the fourteen days he would probably have obtained the goods, for Coupland and Duncan were still solvent. *Moore v. Clementson*, 2 Camp. 22, \*shows that parole evidence may be received to prove [\*247] who was the real principal in a sale of goods, though an invoice may have been given in which that party was not named; a fact upon which Lord Ellenborough, in that case, thought no stress was to be laid. [PATTESON, J.—Such evidence is admissible to charge a party not mentioned in the invoice; but can it also be received to exonerate the seller named in the invoice, when he is sued as such?] If once admitted, it must be available in either case. As to the counts for money had and received, the £52 received by the defendants after the bank-

ruptey was tendered back; and, with respect to the £100, if Coupland and Duncan were the owners of the goods, and sold them through the defendants as brokers, and the defendants received this money with their sanction, the payment was virtually a payment to Coupland and Duncan. *Warner v. M'Kay*, 1 M. and W. 591, S. C. Tyr. and Gr. 965, explain the law on this subject. [PATTESON, J.—According to your view of the case, what need had the plaintiff of a delivery order?] Probably it was a voucher to Coupland and Duncan that the defendants had been paid. The defendants not having the advantage of a lien, may have arranged with the owners that the goods should not be given up without such voucher.

*Cur. adv. vult.*

LORD DENMAN, C. J., on a subsequent day of the term, (May 5,) delivered the judgment of the court. After having stated the pleadings and the facts as they are above set forth, his lordship said,—

On moving to set aside this verdict, the counsel for the defendants argued that the sale by auction was the contract, from which, and the previous advertisement, it was apparent that the plaintiff knew that the defendants were only agents, and who the principals were, and that the learned judge should have left to the jury to say whether the contract was made with the defendants or the principals; urging also that, if the purchase-money had been paid at the proper time, the plaintiff would have obtained the goods; and contending that the £100 must be taken [\*248] as paid to the principals, and might be proved \*under the fiat against them; and that the £52, paid after the fiat, had been tendered. And he cited *Moore v. Clementson*, 2 Camp. 22, to show that the form of the invoice made no difference, but evidence was admissible to show who was the real contracting party; contending that, from the evidence of the facts and the custom, the invoice had the same effect as if it stated that the plaintiff bought of the defendants for Coupland and Duncan, payment to be made to the defendants.

There is no doubt that evidence is admissible, on behalf of one of the contracting parties, to show that the other was agent only, though contracting in his own name, and so to fix the real principal; but it is clear that, if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility. In this case there is no contract signed by the sellers, so as to satisfy the Statute of Frauds, until the invoice, by which the defendants represent themselves to be the sellers: and we think that they are conclusively bound by that representation. Their object in so representing was, as appeared by the evidence of custom, to secure the passing of the money through their hands, and to prevent its being paid to their principals; but in so doing they have made themselves responsible; and we think it impossible to read the invoice in the sense proposed.

Rule refused.

\*WHERE AN AGENT CONTRACTS AS AGENT, BUT WITHOUT DIS-  
CLOSING THE NAME OF HIS PRINCIPAL, THE OTHER CONTRACT- [\*249]  
ING PARTY IS NOT BARRED FROM PROCEEDING AGAINST THE PRIN-  
CIPAL, ALTHOUGH HE HAD ORIGINALLY DEBITED THE AGENT, UNLESS  
IN THE MEANTIME THE PRINCIPAL SHALL HAVE SETTLED WITH THE  
AGENT.

### THOMSON v. DAVENPORT.

Feb. 6, 1829.—E. 9 B. & C. 78. Eng. Com. Law Reps., vol. 17.

THIS was a writ of error, brought upon a judgment obtained in the Borough Court of Liverpool against the plaintiff in error. The plaintiff below declared for goods sold and delivered. Plea, general issue. Upon the trial before the mayor and bailiffs, assisted by the recorder, a bill of exceptions was tendered to the direction given by the mayor, bailiffs, &c., by the said recorder to the jury. The bill of exceptions stated, that one Thomas M'Kune was produced and examined upon oath as a witness by the counsel for the plaintiffs, to maintain the issue on their parts. And M'Kune stated in evidence, that he, M'Kune, was established in Liverpool as a general Scotch agent, and, amongst others, acted as agent for the defendant, who resided in Dumfries; that in March, 1823, he received from the defendant a letter, containing an order to purchase various goods, and, amongst others, a quantity of glass and earthenware; which letter, with the order, was produced by the plaintiffs' attorney, and was read in evidence as follows:—"Dumfries, 29th March, 1823.—Annexed is a list of goods which you will procure and ship per Nancy. Memorandum of goods to be shipped: twelve crates of Staffordshire ware, crown window glass, ten square boxes," &c., &c. That, he M'Kune, provided himself with the goods mentioned in this letter, and that he got the glass and earthenware from the plaintiffs, who were glass and earthenware dealers in Liverpool; that at the time he ordered the glass and earthenware, he saw the plaintiff, Mountford Fynney himself, and, to the best of his recollection, told him, that he, M'Kune, had an order to purchase some goods, and that they were the same house for whom he had purchased goods from \*the plaintiffs the preceding year; and he also stated, to the best of his recollection, that as he was a [\*250] stranger to the nature of the goods, he hoped that the plaintiffs would let him have the same as before, to save him from blame by his employer; but he, M'Kune, did not show the plaintiffs the letter containing the order, nor did he mention the name of any principal; that he then either gave the plaintiff, Mountford Fynney, a copy of the order, or produced to him the original order, that Fynney might himself take a copy, but he rather thought the former was the fact, and that the plaintiff, Fynney, did not see the original, though he could not say positively; that the plaintiff accordingly furnished the glass and earthenware, the amount of which, deducting the discount, was £193, 7s. 8d., but adding the discount, £219, 10s., and rendered invoices thereof to M'Kune, headed thus:—"Mr. Thomas M'Kune bought of John and James Davenport"

(which was the plaintiffs' firm;) that M'Kune entered the net amount, £198, 7s. 8d., to the credit of the plaintiffs in an account with them in his books, and charged the same sum, with the addition of 2 per cent. for the commission, to the debit of the defendant in an account with him, which was according to his invariable course of dealing; and that he sent to the defendant a general invoice of all the goods purchased, comprising the glass and earthenware, but not mentioning the plaintiffs' names; that afterwards, in April, 1823, and before the credit for the goods had expired, M'Kune became insolvent, though up to the day of his stopping payment he was in good credit, and could have bought goods on trust to the amount of £20,000; whereupon the said mayor and bailiffs, by the said recorder, after stating the evidence, told the jury that, from the distance of time since the sale took place, there was some uncertainty in the evidence of M'Kune as to the precise words used by him to the plaintiffs at the time he gave them the order for the goods; but it appeared to them, (the said recorder,) upon the evidence, that the name of the defendant as principal was not then communicated or known to the plaintiffs; and directed the jury, that if they were of opinion that the defendant's name as principal was mentioned by M'Kune to the plaintiffs at the time the order was given, or that the plaintiffs [\*251] then knew that the defendant \*was the principal, their verdict ought to be for the defendant; but if they were of opinion that the defendant's name as the principal was not mentioned by M'Kune to the plaintiffs at the time of the order being given, and that the plaintiffs did not then know that the defendant was the principal, and they did not think, upon all the said facts of the case, that the plaintiffs, at the time of the order being given, knew who the principal was, so that they then had a power of electing whether they would debit the defendant or M'Kune, they ought to find a verdict for the plaintiffs; and that, although the plaintiffs at the time of the sale might think that M'Kune was not buying the goods upon his own account, yet if his principal was not communicated or made known to them, that circumstance ought to make no difference in the case. The jury, after finding as a fact that the letter containing the order was not shown and made known to the plaintiffs, gave their verdict for the plaintiffs below for £219, 10s. It was contended that the mayor and bailiffs, by the recorder, ought to have directed the jury, that if they were satisfied that Davenport, &c., at the time of the order being given, knew that M'Kune was buying the goods as an agent, even though his principal was not communicated or made known to them, they, by afterwards debiting M'Kune, and so rendering the said invoices, had elected to take him for their debtor, and had precluded themselves from calling on Thomson.

*Joy* for the plaintiff in error.—Davenport and Co., the sellers of these goods, knowing that M'Kune was an agent, and electing to take him as their debtor, cannot now resort to Thomson. The two following propositions will not be disputed. Where the seller of goods, knowing that the buyer, though dealing in his own name, is, in truth, the agent of another, elects to give the credit to such buyer, he cannot afterwards recover their value from the principal. On the other hand, if the seller

be ignorant at the time of the sale that the purchaser is buying from another person, that person may be sued, unless where the seller may have abandoned his right to resort to him. Of these two propositions the first is absolute, the second conditional. It will be contended that this is an intermediate case, \*and altogether new. But it clearly falls within the first of the above propositions; or, if it can be [\*252] said to range between them at all, it is not equidistant, but approximates to the first more nearly than to the second. Or, thirdly, if it were practicable to force it nearer to the second, this case would clearly fall within the condition. Here the sellers were distinctly informed that the buyer was in truth the agent of another, and yet they elected to give credit to such agent. They have, therefore, thus precluded themselves from recovering over against the principal. They chose to treat the agent as their debtor, with a full knowledge that the goods were for another. They were so satisfied to have the agent for their debtor, that they did not even ask the name of his principal. It was natural they should prefer him to a house at Dumfries, the members of which resided out of the reach of the laws of England. It will be said that they could not elect to take him as their debtor, because the name of the principal was not mentioned. But that was the fault of the sellers: they did not ask the name. They were told the goods were for a house at Dumfries. There was no attempt at concealment on the part of the buyer. If they had not fully decided, at the time of making the contract, to prefer M'Kune to any house in Dumfries, they would surely have inquired for what house he was acting. This omission made their preference of him manifest. They knew not only that M'Kune was buying for another, but they knew also the description of that other, viz., a house in Dumfries. Beyond this, what was there in the name? Or, if anything worth their knowing, their ignorance of it was solely imputable to their own laches. *Caveat venditor*. If they wilfully closed their eyes against further light then, they cannot now complain that it was imperfect. But they had abundant information whereon to exercise an election, and by their conduct they have shown that they preferred to take M'Kune as their debtor. The name of the principal is wholly immaterial, if the sellers, knowing that there is a principal, elect to take the agent as their debtor. If this case, therefore, come nearer to the second proposition, the sellers must be held to have abandoned their right to resort to the principal. This doctrine is fully established by *Paterson v. Gandasequi*, 15 East, 62, and *Addison v. Gandasequi*, \*4 Taunt. 574; and [\*253] partially confirmed by *Maanss v. Henderson*, 1 East, 335, where it was held to be a sufficient intimation of the agent's character, that he, in time of war, described a ship as neutral. It is consonant to the general principle of the law merchant, as evinced by its admission in the case of foreign principals. And as, in respect to the difference of courts and the difficulties of executing process, a Scotchman domiciled in Dumfries stands much in the same position as a foreigner, the same rule should hold as to both. In point of law, therefore, this doctrine is consistent with the decisions in analogous cases; in point of commercial

policy, it is expedient; and in point of equity, between these parties, it is just.

*Patteson*, contra.—It is undoubtedly established by the authorities, that if the seller knows that there is a principal, and also who that principal is, and afterwards gives credit to the agent, he thereby makes his election, and abandons his right to resort to the principal. But in this case the seller did not, either at the time of the sale or at the time when he gave credit to the agent, know the name of the principal; he had not, therefore, the power of making any election. This case, therefore, does not fall within the authorities cited. On the other hand, it is clearly established, that if the seller does not at the time of the sale know that the buyer is an agent, he may, when he discovers the fact, sue the principal, although in the meantime he has given credit to the agent. The present is an intermediate case, for here the seller knew at the time of the sale that the buyer was an agent, but did not know for whom he was agent. The seller was not bound to inquire the name of the principal; and therefore this case belongs to the latter, rather than the former class. The seller cannot make his election between the agent and principal until he knows who the principal is; for the election implies a comparison of their individual credit. The right to resort to the principal could be determined only by reason of the seller having exercised an election, and that right was not put an end to in this case, because no election was or could be exercised. Neither is the buyer injured by the seller suing the principal; the credit had not expired when [\*254] the action was commenced, nor had the \*buyer settled any account with his principal. The buyer, therefore is not in a worse situation than he was before. *Wilson v. Hart*, 7 Taunt. 296, and *Seymour v. Pychlau*, 1 B. and A. 14, show that the rule as to discharging the principal is not to be extended. As to the argument from inconvenience, if an unknown principal is not to be liable when discovered, great inconvenience will follow. The majority of contracts are made by agents who are known to be agents, but the names of their principals are not known. In *Moore v. Clementson*, 2 Camp. 22, it was held, that although a factor sells goods as a principal, yet, if, before they are all delivered, and before any part of them is paid for, the purchaser is informed that they belong to a third person, in an action by the latter for the price of them, the purchaser cannot set off a debt due to him from the factor. Lord Ellenborough there says, "A man who is in the habit of selling the goods of others, may likewise sell goods of his own; and where he sells goods as a principal, with the sanction of the real owner, the purchaser, who is thus led to give him credit, shall on no account afterwards be deprived of his set-off by the intervention of a third person. But here there was express notice to the purchaser, before the contract was completed, that Green, in this particular transaction, acted only as a factor." In *Railton v. Hodgson*, *Paterson v. Gandasequi*, 15 East, 64, the sellers gave credit to Smith, Lindsay, and Co.; but it was held, they might maintain an action against the defendant, who had had the goods. The defendant here has had the goods, and in justice ought to pay for them, unless the plaintiff has done anything to preclude him-

self from suing, or unless it be shown that by suing the defendants he is altering the rights of other parties, and neither of those things can be shown.

Lord TENTERDEN, C. J.—I am of opinion that the direction given by the learned recorder in this case was right, and that the verdict was also right. I take it to be a general rule, that if a person sells goods, supposing at the time of the contract he is dealing with a principal, but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may \*in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal, subject, [\*255] however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal. On the other hand, if at the time of the sale the seller knows, not only that the person who is nominally dealing with him is not principal but agent, and also knows who the principal really is, and notwithstanding all that knowledge, chooses to make the agent his debtor, dealing with him and him alone, then, according to the cases of *Addison v. Gandasequi*, 4 Taunt. 574, and *Paterson v. Gandasequi*, 15 East, 62, the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other. The present is a middle case. At the time of the dealing for the goods, the plaintiffs were informed that M<sup>c</sup>Kune, who came to them to buy the goods, was dealing for another, that is, that he was an agent, but they were not informed who the principal was. They had not, therefore, at that time, the means of making their election. It is true that they might, perhaps, have obtained those means if they had made further inquiry; but they made no further inquiry. Not knowing who the principal really was, they had not the power at that instant of making their election. That being so, it seems to me that this middle case falls in substance and effect within the first proposition which I have mentioned, the case of a person not known to be an agent; and not within the second, where the buyer is not merely known to be agent, but the name of his principal is also known. There may be another case, and that is where a British merchant is buying for a foreigner. According to the universal understanding of merchants, and of all persons in trade, the credit is then considered to be given to the British buyer, and not to the foreigner. In this case the buyers lived at Dumfries; and a question might have been raised for the consideration of the jury, Whether, in consequence of their living at Dumfries, it may not have been understood among all persons at Liverpool, where there are great dealings with Scotch houses, that the plaintiffs had given credit to M<sup>c</sup>Kune only, and not to a person \*living, though not in a foreign country, yet in that part of the king's dominions which rendered him not [\*256] amenable to any process of our courts? But, instead of directing the attention of the recorder to any matter of that nature, the point insisted upon by the learned counsel at the trial was, that it ought to have been part of the direction to the jury, that if they were satisfied the plaintiffs,

at the time of the order being given, knew that M·Kune was buying goods for another, even though his principal might not be made known to them, they by afterwards debiting M·Kune had elected him for their debtor. The point made by the defendant's counsel, therefore, was, that if the plaintiffs knew that M·Kune was dealing with them as agent, though they did not know the name of the principal, they could not turn round on him. The recorder thought otherwise: he thought that though they did not know that M·Kune was buying as agent, yet, if they did not know who his principal really was, so as to be able to write him down as their debtor, the defendant was liable, and so he left the question to the jury, and I think he did right in so doing. The judgment of the court below must therefore be affirmed.

BAYLEY, J.—There may be a course of trade by which the seller will be confined to the agent who is buying, and not be at liberty at all to look to the principal. Generally speaking, that is the case where an agent here buys for a house abroad. There may also have been evidence of a course of trade, applicable to an agent living here acting for a firm resident in Scotland. But that does not appear to have been made a point in this case, and it is not included in the objection which is now made to the charge of the recorder. In my opinion, the direction of the recorder was right; and it was, with the limits I have mentioned, perfectly consistent with the justice of the case. Where a purchase is made by an agent, the agent does not of necessity so contract as to make himself personally liable; but he may do so. If he does make himself personally liable, it does not follow that the principal may not be liable also, subject to this qualification, that the principal shall not be prejudiced by being made personally liable, if the justice of the case is that he should not be personally liable. If the principal \*has paid the agent, or [\*257] if the state of accounts between the agent here and the principal would make it unjust that the seller should call on the principal, the fact of payment, or such a state of accounts, would be an answer to the action brought by the seller where he had looked to the responsibility of the agent. But the seller, who knows who the principal is, and instead of debiting that principal, debits the agent, is considered, according to the authorities which have been referred to, as consenting to look to the agent only, and is thereby precluded from looking to the principal. But there are cases which establish this position, that although he debits the agent who has contracted in such a way as to make himself personally liable, yet, unless the seller does something to exonerate the principal, and to say that he will look to the agent only, he is at liberty to look to the principal when that principal is discovered. In the present case the seller knew that there was a principal; but there is no authority to show that mere knowledge that there is a principal, destroys the right of the seller to look to that principal as soon as he knows who that principal is, provided he did not know who he was at the time when the purchase was originally made. It is said, that the seller ought to have asked the name of the principal, and charged him with the price of the goods. By omitting to do so, he might have lost his right to claim payment from the principal, had the latter paid the agent, or had the state of the



accounts between the principal and the agent been such as to make it unjust that the former should be called upon to make the payment. But in a case circumstanced as this case is, where it does not appear but that the man who has had the goods has not paid for them, what is the justice of the case? That he should pay for them to the seller or to the solvent agent, or to the estate of the insolvent agent, who has made no payment in respect of these goods. The justice of the case is, as it seems to me, all on one side, namely, that the seller shall be paid, and that the buyer (the principal) shall be the person to pay him, provided he has not paid anybody else. Now, upon the evidence it appears that the defendant had the goods, and has not paid for them either to M<sup>r</sup> Kune or to the present plaintiffs, or to anybody else. He will be liable to pay for them either to the \*plaintiffs, or to M<sup>r</sup> Kune's estate. The justice of the case, as it seems to me, is, that he should pay the plaintiffs [\*258] who were the sellers, and not any other person. I am, therefore, of opinion that the direction of the recorder was right.

LITLEDALE, J.—The general principle of law is, that the seller shall have his remedy against the principal rather than against any other person. Where goods are bought by an agent, who does not at the time disclose that he is acting as agent, the vendor, although he has debited the agent, may, upon discovering the principal, resort to him for payment. But if the principal be known to the seller at the time when he makes the contract, and he, with a full knowledge of the principal, chooses to debit the agent, he thereby makes his election, and cannot afterwards charge the principal. Or if in such a case he debits the principal, he cannot afterwards charge the agent. There is a third case; the seller may, in his invoice and bill of parcels, mention both principal and agent; he may debit A. as a purchaser for goods bought through B. his agent. In that case, he thereby makes his election to charge the principal, and cannot afterwards resort to the agent. The general principle is, that the seller shall have his remedy against the principal, although he may by electing to take the agent as his debtor, abandon his right against the principal. The present case differs from any of those which I have mentioned. Here the agent purchased the goods in his own name. The name of the principal was not then known to the seller, but it afterwards came to his knowledge. It seems to me to be more consistent with the general principle of law that the seller shall have his remedy against the principal, rather than against any other person, to hold in this case that the seller, who knew that there was a principal, but did not know who that principal was, may resort to him as soon as he is discovered. Here the agent did not communicate to the seller sufficient information to enable him to debit any other individual. The seller was in the same situation, as if at the time of the contract he had not known that there was any principal besides the person with whom he was dealing, and had afterwards discovered that the goods had been purchased on account of another; and, in that \*case, it is clear that he might have charged the principal. It is said, that he ought to have ascertained by [\*259] inquiry of the agent who the principal was, but I think that he was not bound to make such inquiry, and that by debiting the agent with the

price of the goods, he has not precluded himself from resorting to the principal, whose name was not disclosed to him. It might have been made a question, whether it was not a defence to this action that the principal resided in Scotland. But that was not a point made at the trial, nor noticed in the bill of exceptions; we cannot, therefore, take it into our consideration. For the reasons already given, I think the plaintiff is entitled to recover.

Judgment affirmed.

PARKE, J., having been concerned as counsel in the cause, gave no opinion.

WHERE AN AGENT CONTRACTS IN HIS OWN NAME, AND THE OTHER CONTRACTING PARTY KNOWS THAT HE IS ACTING FOR A PRINCIPAL, AND ALSO KNOWS WHO THE PRINCIPAL REALLY IS, AND CHOOSES TO MAKE THE PRINCIPAL HIS DEBTOR, DEALING WITH HIM ONLY, HE CANNOT AFTERWARDS ON THE FAILURE OF THE AGENT PROCEED AGAINST THE PRINCIPAL.

### PATERSON v. GANDASEQUI.

Jan. 31, 1812.—E. 15 East, 61.

THIS was an action for goods sold, and upon the common money counts.

At the trial before Lord Ellenborough, C. J. at the London sittings after last Trinity Term, the following facts appeared :—

The defendant was a Spanish merchant, and a director of the Phillipine Trading Company at Madrid, with which he was engaged in adventures to a large amount. In January, 1810, being then in London, he [\*260] employed Messrs. Larrazabal and Co. \*of London, Merchants, to purchase for him various assortments of goods for the foreign market, for which they were to charge a commission of 2 per cent. Larrazabal and Co. accordingly applied to the plaintiffs, requesting them to send to their counting-house an assortment of silk hose with their terms and prices. Paterson, Jun., waited on them at the time and place appointed, with the patterns, terms, and prices; at which time the defendant was present at the counting-house, and the samples were handed over to him. He inspected them, and selected such articles as he required; and the terms and prices were also shown to him and left there. On the 6th of January, the plaintiffs received from Larrazabal and Co. an order in writing for 574 dozen of silk hose, to be ready in town on or before the 20th of February next, the payment as agreed upon. (Signed) Larrazabal, Menoyo, and Trotiaga; and shortly after another order for 150 dozen more, with the like signature. Both these orders were given by Larrazabal and Co. for the use of and in execution of the orders received by them from the defendant. The goods were sold by the

plaintiffs on the credit of Larrazabal and Co., the invoices were made out in their names and sent to them, and Larrazabal debited the defendant with the amount. Soon after, and before the credit had expired, Larrazabal and Co. became insolvent; and thereupon the plaintiffs demanded payment of the defendant; which being refused, the present action was brought.

Lord ELLENBOROUGH, C. J., being of opinion upon these facts, that the plaintiffs had dealt with Larrazabal and Co. upon their sole and individual credit, knowing that the purchases they made were on account of the defendant, directed a nonsuit. In the following term it was moved to set aside the nonsuit, on the ground of assimilating this case of a dormant principal to that of a dormant partner, where, though the party furnishing goods to the ostensible partners intended at the time to give credit only to them, yet he may afterwards pursue his remedy against the dormant partner, when discovered. A rule *Nisi* having been granted,

The *Attorney-General*, *Marryat*, and *Littledale*, now \*showed [\*261] cause against it; and observed upon the facts of the case, that the defendant, a foreigner, not wishing to pledge his credit in a British market, employed Larrazabal and Co. to make purchases for him on their own account, to whom he was to be answerable for the purchases so made. The plaintiffs dealt with Larrazabal and Co. as purchasers, and gave them credit for the goods, being aware at the time that they were purchased by Larrazabal and Co. on account of the defendant. If the defendant were to be held liable for the goods to these plaintiffs, he will have to pay twice for them; being clearly liable to Larrazabal and Co. [Lord ELLENBOROUGH, C. J.—I have had instances perpetually before me, where the foreign trader, not choosing to make himself liable, has gone with his agent to the tradesmen, and bought goods in the agent's name. I do not find any case which decides that where a person sells goods to an agent, with a knowledge of his principal at the time, and gives credit to the agent, he can recover against the principal.] [*Garrow* for the plaintiffs, observed, that the whole of the argument on behalf of the plaintiffs was, that the defendant was not known to the plaintiffs at the time of the sale to be the principal.] The facts show the contrary. The defendant, it appears, was present at the time, and pointed out to the plaintiffs the different articles which he required, and selected them from the patterns. The only ground, therefore, for holding the defendant liable is, that the goods ultimately came to his hands. But if this were enough, every foreign colonist who consigns his produce to his correspondent in this country, and receives in return from the merchant here a cargo purchased in the British market, would be liable to the various dealers of whom the articles composing such cargo were purchased. But it has never been attempted to charge the West India planter in these cases; the reason of which is, that, as between him and the dealers, it is understood that the merchant here purchases on his own account. There is no custom to control that particular branch of trade, except what arises out of the understanding of the parties: where the dealings therefore are similar, the understanding must be the same. Here the defendant stands precisely in the same situation as the West India planter. He who employs

[\*262] another to purchase \*for him may indeed be liable, although the seller gave him no credit, if it shall turn out that he is the actual purchaser; but there is nothing in this transaction, or in the nature of Larrazabal's employment, to show that the defendant was the purchaser from the plaintiffs; on the contrary, the engagement between them was made with the express view of exempting him from all such liability; and the plaintiffs by their mode of dealing have shown that they so understood it, and cannot therefore now resort to him. [Lord ELLENBOROUGH, C. J.—The case in which I remember that the liability of a principal was carried furthest was *Powel v. Nelson*, upon the western circuit, of which Mr. Justice Lawrence had a MS. note. There a factor made purchases for his principal, who made payments to him on account. Afterwards the factor was pressed for payment by a letter which came to the hands of the principal, who transmitted it to the factor, and with a knowledge of the fact paid him the residue. It was held by Lord Mansfield, C. J., that the principal was liable over to the sellers for the money he had so paid to his factor after notice.] The Attorney-General said he believed that the case went farther, and that the principal there was held liable to the whole amount of the purchases. [LE BLANC, J.—I should think not: the case can hardly be supported to that extent.] If the seller be at liberty to follow every person into whose hands the goods may have come, it will create endless confusion. A broker may have purchased on account of several principals, and may have received from each of them payments on the general account, or may have made such payments to the seller: in these cases how could the seller apportion such payments so as to charge each person with his proportional residue? There are many instances where the principal is not liable; as in building contracts; and yet the work done and materials found are for the principal only. [Lord ELLENBOROUGH mentioned a late case of *Bramah v. Lord Abingdon*, where the defendant had contracted with a surveyor, who ordered goods from the plaintiff for the use of the defendant's house; and yet he was held not liable.] In the present case it appears further, that the plaintiffs have made their election to charge Larrazabal and Co. [\*263] by delivering the invoices to and \*debiting them with the price; after which they cannot resort to the defendant. There may be a shifting liability from the broker to the principal, when the latter is disclosed; but if once the election be made that liability ceases; for the plaintiffs cannot have two concurrent debtors.

*Garrow, Park, and Richardson*, contra.—There is no circumstance in this case to show that the plaintiffs knew at the time of the sale that the defendant was the principal, except that of his happening to be at the counting-house when the goods were selected. So far from knowing him to be the principal, it does not appear that they knew him even by name. The circumstance of their making out the bills of parcels to Larrazabal and Co. carries the case no further; for that was done at a time when they were ignorant of the defendant's liability; which is an answer also to the argument derived from the supposed election of the plaintiffs to resort to Larrazabal and Co. only; it being impossible for them to have made any such election until they knew the parties between

whom they might elect. It is, therefore, the common case of a broker who has made purchases for his principal without mentioning his name, in which the principal has always been held liable; as in *Waring v. Favenck*, 1 Camp. N. P. Cas. 85, and *Kymer v. Suwercropp*, 1 Camp. N. P. Cas. 109. In *Railton v. Hodgson*, London sittings after Trinity Term, 1804, and *Peele v. Hodgson*, at the sittings after Michaelmas Term, 1804, where the defendant bought goods of the plaintiffs, in the name and upon the credit of Smith and Co.; but those purchases were made in reality on his own account; he was held to be liable. MANSFIELD, C. J., said, Suppose a principal authorizes a factor to sell goods, and he sells them in his own name, the principal may call on the vendee for payment. Suppose the defendant had not been known to be the buyer, he would still have been liable; Smith and Co. would only have been nominal buyers. So in *Scrimshire v. Alderton*, 2 Stra. 1182, even where a factor sold on a *del credere* commission, the vendee was held liable to the owner of the goods after notice given not to pay the factor. This is not like the case put of a foreign principal residing abroad; for the defendant was resident here, and establishing \*a house of [264] trade. Neither can it be compared with that of a person engaging with a surveyor in a building contract; because there the persons employed under the surveyor have notice by the course of the trade that they are dealing with him only. Here if the defendant had wished to exempt himself from the ordinary liability, he should have given notice to the sellers that they were to look to Larrazabal and Co. only. No confusion will arise from holding the defendant liable, because the goods here were bought wholly on his account, and not, as in the case supposed, on the account of several principals.

LORD ELLENBOROUGH, C. J.—The court have not the least doubt that if it distinctly appeared that the defendant was the person for whose use and on whose account the goods were bought, and that the plaintiffs knew that fact at the time of the sale, there would not be the least pretence for charging the defendant in this action. But the doubt is whether that does sufficiently appear by the evidence. It appears that the defendant was present at the counting-house of Larrazabal, where one of the plaintiffs had come by appointment, and in his presence inspected and selected such of the articles as he required; that the goods were afterwards ordered by Larrazabal and Co., credit given to them, and the invoices made out in their name, and sent to them. The question is, Whether all this was done with a knowledge of the defendant being the principal? The law has been settled by a variety of cases, that an unknown principal, when discovered, is liable on the contract which his agent makes for him; but that must be taken with some qualification, and a party may preclude himself from recovering over against the principal, by knowingly making the agent his debtor. It certainly appeared to me at the trial that the plaintiffs knew of the defendant being the principal, and had elected to take Larrazabal and Co. as their debtors, or I should not have nonsuited the plaintiffs; but as there may perhaps be a doubt upon the evidence, whether the plaintiffs had a perfect knowledge of that fact, it may be as well to have it reconsidered.

[\*265] GROSE, J.—I think that the plaintiffs in this case might \*have elected whom they would have for their debtor; and here they seem to have made their election. That, however, is the only doubt which is fit to be considered.

LE BLANC, J.—It will be material to have the facts inquired into more fully, in order to ascertain whether the tradesmen sold to the agents with a knowledge of the party for whom they were buying; or whether, without such knowledge, they chose to give credit to the agents, whether buying for another or for themselves. Many of the cases may, perhaps, be found distinguishable from this by their not falling precisely within the doctrine applicable to principal and broker; and it may be necessary to consider in the present case, whether any distinction can be made between a home and a foreign principal.

BAYLEY, J.—There may be a particular course of dealing with respect to trade in favour of a foreign principal, that he shall not be liable in cases where a home principal would be liable; that would be a question for the jury. I have generally understood that the seller may look to the principal when he discovers him, unless he has abandoned his right to resort to him. I agree that where the seller knows the principal at the time, and yet elects to give credit to the agent, he must be taken to have abandoned such right, and cannot therefore afterwards charge the principal. I think it should be re-considered in this case whether the plaintiffs did so.

Rule absolute.

[\*266] \*A PRINCIPAL IS NOT LIABLE FOR ANY DAMAGE OCCASIONED BY THE ACTS OF A SUB-AGENT.

# I.—QUARMAN v. BURNETT.

Easter Term, 1840.—E. 6 Mees. & W.

CASE.—The declaration stated, that the plaintiff, on the 21st December, 1838, was possessed of a carriage, to wit, a chaise, of great value, &c., and of a horse then drawing the same, in which said carriage the plaintiff was then riding; and that the defendants were also possessed of a carriage, to wit, a chariot, to which said carriage of the defendants were harnessed two horses, and which said carriage and horses were then under the care of the defendants. Nevertheless the defendants so carelessly, &c., conducted themselves in the premises, that by and through the mere carelessness, negligence, want of proper caution, and improper conduct of the defendants in that behalf, the said horses so harnessed to the carriage of the defendants started off with the said carriage, without a driver or other person to manage, govern, or direct the same, whereby the said carriage of the defendants then ran and struck with great force against the said carriage of the plaintiff, and thereby greatly crushed and injured the same, and the plaintiff was thrown with great force and violence out of his carriage upon the ground, &c. &c.

Pleas, first, not guilty; secondly, that the said carriage and horses in the declaration mentioned, or either of them, were not under the care of the defendants, or either of them, in manner and form, &c.; upon which issues were joined.

At the trial before Maule, B., at the Middlesex sittings in last Michaelmas Term, the following appeared to be the material facts of the case :—

The defendants are elderly ladies resident in Moore Place, Lambeth, keeping a carriage of their own, but hiring horses and a coachman from a job-mistress of the name of Mortlock. They generally had the same horses and always the same coachman, a man of the name of Kemp, (the only regular coachman in Miss Mortlock's employ,) to whom they paid 2s. for each drive, having told him when they first set up their [\*267] own carriage, three years ago, that they would pay him that sum. He received regular weekly wages from Miss Mortlock. The defendants sometimes took the coachman and horses into the country for several weeks, when they paid him a certain sum per week. They had a plain coachman's coat and a livery hat, for which Kemp was measured, and which he wore when driving the defendants, and took off on his return to their house, where the coat and hat were hung up in the passage. On the 21st December, 1838, he went into the defendants' house to pull off the hat, (he did not wear the coat that day, having his own box coat on,) and left no one in charge of the horses: they started off, ran against the plaintiff's chaise, which was drawn up on the side of the footpath, threw him out, and seriously injured him, and damaged the chaise.

This being the state of facts, it was contended for the defendants that Kemp was, under the circumstances, the servant, not of the defendants, but of the job-mistress, and that the defendants were not responsible. The following cases were referred to :—*Laugher v. Pointer*, 5 B. and C. 547; *Smith v. Lawrence*, 2 Man. and R. 1; *Brady v. Giles*, 1 M. and Rob. 494; *Fenton v. Dublin Steam Packet Company*, 8 Ad. and E. 835; 1 P. and D. 103; *Randleson v. Murray*, 8 Ad. and E. 109; 3 N. and P. 239. The learned judge thought there was evidence to go to the jury, but gave the defendants' counsel leave to move to enter a nonsuit; it appearing to him that there was some evidence that the carriage was under the defendants' care, both in respect of their choosing this particular coachman, and also in respect of his having gone to put back their hat, and left the carriage unattended to. And he told the jury, that if the coachman was, at the time the horses ran away, acting as the servant of the defendants, they were liable; and that he thought he was acting as such servant, if the job-mistress appointed him specially at the defendants' desire, or if in putting back his hat he acted for the defendants. The jury found a verdict for the plaintiff, damages £198, 9s.

*Kelly* having obtained a rule *Nisi* for entering a nonsuit, pursuant to the leave reserved,

\**Thomas* (Sir F. Pollock being with him) showed cause at the sittings after Hilary Term.—The direction of the learned judge [\*268] was right, and the verdict ought to stand. The only question is, whether

the carriage and horses could be said to be in the care of the defendants, in the sense imputed by the declaration? The important case on this subject is that of *Laugher v. Pointer*, in which the judges of the Court of King's Bench were equally divided. There the owner of the carriage hired a pair of horses of a stable-keeper to draw it for a day, and the latter provided the driver, who was paid by gratuities given by the owner of the carriage. Lord Tenterden and Littledale, J., held that the owner of the carriage was not liable to be sued for an injury done by his negligent driving; Bayley, J., and Holroyd, J., being of a contrary opinion. The present case, however, is distinguishable from that, and falls within the exceptions stated by the two former learned judges to the doctrine they there laid down. Lord Tenterden says,—“In the case now before the court, the hirer makes no contract with the coachman; he does not select him; he has no privity with him; he usually gives him a gratuity; but he is not obliged by law to give him anything; and from thence I conclude that the coachmen is not the servant of the hirer; and if the coachmen is not the servant of the hirer on such an occasion, but is chosen and intrusted by the owner of the horses to conduct and manage them, I think it cannot be said that the hirer has in law, what he certainly has not in fact, the conduct and management of the horses.” And again,—“Length of time may in itself be a circumstance deserving of attention, because it may be evidence of the subsequent approbation and continuance, if not of the original choice of the coachman. The payment of board wages, and the furnishing a livery, may also be circumstances worthy of attention, because they also may, in some cases, be considered as evidence of a choice and a contract.” In the present case the defendants exercised a choice in the selection of this particular coachmen; they paid him, by agreement, a certain sum for each drive; and they supplied him with livery, which he was changing in the house when this accident occurred. The case, therefore, goes far beyond that of *Laugher v. Pointer*, and falls within [\*269] the \*observations of all the judges in that case. In *Randleson v. Murray*, the defendants, who were occupiers of a bonded warehouse in Liverpool, engaged a master porter to lower and convey a barrel of flour from their warehouse. The master porter engaged a master carter, and both of them attended with their men. While being lowered, the barrel fell and injured the plaintiff, owing to the defectiveness of a rope furnished by the master porter. The defendants were held liable, Lord Denman, C. J., saying, “It makes no difference whether they employed people of their own to move their goods, or procured others who were likely to move them more expertly, and left it to their superintendence.” In *Fenton v. Dublin Steam Packet Company*, where the plaintiff's vessel was sunk by a steamboat, of which the defendants were owners, but which was at the time chartered to another for a voyage, his lordship says,—“The charterer may be answerable also; but unless the charter-party has interfered with the general control of the owners, they are clearly liable.” [ALDERSON, B.—“Interference” there means some interference which causes the injury.] Such was the case here, the injury having occurred while the coachman was absent



for the defendants' benefit. It was their duty to send somebody to take care of the horses, while he was acting in compliance with their directions for their benefit. If a party holds himself out to the world as the owner of a vehicle, by the negligent driving of which damage is occasioned, he is liable, though he has ceased to be the actual owner: *Stables v. Eley*, 1 C. and P. 614. Here the defendants were clearly, in every respect, the ostensible owners of the carriage and horses. But further, the terms of their agreement with the coachman, giving him a stated sum for each drive, which was evidently a regular part of his livelihood, made him their servant. In *Brady v. Giles*, 1 M. and Hob. 494, a case similar to the present, Lord Abinger, C. B., refused to nonsuit, holding it to be, in all such cases, a question for the jury whether the parties were acting as the servants of the owner or of the hirer of the carriage. The learned judge did the same in the present case, and the jury have found that the coachman was the servant of the defendants. But independently of any special circumstances in the present case, the plaintiff contends \*that the doctrine laid down by [\*270] *Bayley, J.*, and *Holroyd, J.*, in *Laugher v. Pointer*, is the correct one, and that the coachman is in point of law the servant of the hirer. He cited also *Illidge v. Goodwin*, 5 C. and P. 190, and *Croft v. Alison*, 4 B. and Ald. 590.

*Channell, Serjt.*, (Kelly with him,) in support of the rule.—The special circumstances relied on in this case do not distinguish it from the case of *Laugher v. Pointer*. In the first place, there was no bargain for any specific wages to be paid by the defendants to Kemp the coachman, but merely an understanding that he should receive a certain gratuity; and he was paid regular weekly wages by his employer. The same was the state of facts in *Laugher v. Pointer*. Nor was he selected by the defendants to drive them, he being the only regular coachman in the yard. When Lord Tenterden, in *Laugher v. Pointer*, refers to "length of time" as a circumstance which may indicate the approbation and continuance of the particular coachman, he means to refer to some definite period of employment by the hirer; and all the circumstances specified by him, of time, wages, livery, &c., were meant to be important, as indicating "a choice and a contract." But can two parties be concurrently liable? Convenience is against it, as leading to multiplicity of actions. And if one only be liable, convenience also indicates that the action should be against the party who originally hired the driver as a servant. And this is consistent with justice, because he is the most culpable, if the driver is not trustworthy or skilful. *Holroyd, J.*, in *Laugher v. Pointer*, expressed an opinion that one party only could be liable. It is clear that Kemp was in the service of Mortlock for this particular employment and duty. Then is there anything to warrant the inference, that in suffering him to drive them, the defendants not only evinced a choice, but entered into contract? [PARKE, B.—It appears to us that there are no special circumstances which distinguish the present case, and that we must decide the difference between the judges in *Laugher v. Pointer*. There is no satisfactory evidence of any selection, by which this man was made the defendants' servant; the

[\*271] question is therefore the same as in that case.] All that \*could be urged on both sides of the question was fully stated in that case, and it is needless to repeat the arguments to be found there.

*Cur. adv. vult.*

In this term, the judgment of the court was delivered by

PARKE, B.—This case was tried before my brother Maule, when he had a seat in this court. A verdict was given for the plaintiff, and points reserved, which were argued before my brothers Alderson and Rolfe, and myself, at the sittings after last term. The declaration was in case. It stated, that the plaintiff was possessed of a chaise and horse which he was driving; that the defendants were possessed of a chariot, to which two horses were harnessed, which said carriage and horses were then under the care of the defendants; and that the defendants so carelessly conducted themselves, that through the carelessness and negligence, want of proper caution, and improper conduct of the defendants, the horses so harnessed started off with the carriage, without a driver or other person to manage, govern, or direct the same, whereby the defendants' carriage was struck against the plaintiff's carriage, and the plaintiff sustained personal injury.

There were two pleas,—first, not guilty; secondly, that the carriage and horses, or either of them, were not under the care of the defendants, or either of them.

On the trial, it appeared that the defendants were two old ladies, who had been in the habit of employing a person of the name of Mortlock, and his daughter, who succeeded him in the business of a job-master, to supply them, originally with a fly and horse and driver, by the day, at a certain sum for the whole; but about three years ago they became possessed of a carriage of their own, since which they had been furnished by Miss Mortlock occasionally with a pair of horses and a driver, by the day or drive, for which she charged and received a certain sum. She paid the driver by the week, and the defendants besides gave him a gratuity for each day's service. For the last three years, the same coachman constantly drove the \*defendants' carriage, and they had [\*272] purchased a livery hat and coat for him, which, it appeared, were usually hung up in the passage of the defendants' house, and the coachman, before he drove, was in the habit of going in and putting on the coat and hat, and when he had finished the drive, of returning and replacing them. On the day in question, he wore the hat only, and when he had returned home with the ladies, and after they had got out of the carriage, the coachman went in to replace the hat, and left the horses without any one to hold them, and they set off whilst the coachman was so occupied, and ran against the plaintiff's carriage, overturned it, and inflicted serious personal injury on the plaintiff, besides doing damage to the carriage itself. It appeared that there was no other regular coachman in the job-mistress's yard, but when he was otherwise employed, some other person in the yard acted as coachman, but never for the defendants since they had their own carriage, though occasionally before.

It was objected, that the defendants were not liable, because the dam-

age was caused by the neglect of the coachman, who was not their servant, but the servant of his mistress, Miss Mortlock.

For the plaintiff, it was contended, that they were liable for the coachman's neglect, independently of the special circumstances of the case; and that there were besides two peculiar grounds on which the defendants ought to be held responsible. First, that there was evidence to go to a jury of selection and choice by the defendants of the particular coachman, so as to make him their servant; and secondly, that when the coachman went in to leave his hat, he was, in so doing, acting as the servants of the defendants, and therefore his neglect was theirs.

The jury found a verdict for the plaintiff, with £198, 9s. damages, and my brother Maule reserved liberty to move to enter a nonsuit.

On the argument, in the course of which the principal authorities were referred to, we intimated our opinion that we should be called upon to decide the point which arose in the case of *Laugher v. Pointer*, and upon which not only the Court of King's Bench, but the twelve judges differed; as the special \*circumstances above mentioned did not seem to us to make any difference; and we are still of opinion [\*273] that they did not. It is undoubtedly true, that there may be special circumstances which may render the hirer of job-horses and servants responsible for the neglect of a servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct, as by taking the actual management of the horses, or ordering the servant to drive in a particular manner, which occasions the damage complained of, or to absent himself at one particular moment, and the like. As to the supposed choice of a particular servant, my brother Maule thought there was some evidence to go to the jury, of the horses being under the defendants' care, in respect of their choosing this particular coachman. We feel a difficulty in saying that there was any evidence of choice, for the servant was the only regular coachman of the job-mistress's yard; when he was not at home the defendants had occasionally been driven by another man, and it did not appear that at any time since they had their own carriage, the regular coachman was engaged, and they had refused to be driven by another; and the circumstance of their having a livery, for which he was measured, is at once explained by the fact, that he was the only servant of Miss Mortlock ever likely to drive them. Without, however, pronouncing any opinion upon a point of so much nicety, and so little defined, as the question whether there is some evidence to go to a jury, of any fact, it seems to us, that if the defendants had asked for this particular servant, amongst many, and refused to be driven by any other, they would not have been responsible for his acts and neglects. If the driver be the servant of a job-master, we do not think he ceases to be so by reason of the owner of the carriage preferring to be driven by that particular servant, where there is a choice amongst more, any more than a hack post-boy ceases to be the servant of an innkeeper, where a traveller has a particular preference of one over the rest, on account of his sobriety and carefulness. If, indeed, the defendants had insisted upon the horses being driven, not by one of the regular servants, but by a stranger to

the job-master, appointed by themselves, it would have made all the difference. Nor do we \*think that there is any distinction in this [\*274] case, occasioned by the fact that the coachman went into the house to leave his hat, and might therefore be considered as acting by their directions, and in their service. There is no evidence of any special order in this case, or of any general order to do so, at all times, without leaving any one at the horses' heads. If there had been any evidence of that kind, the defendants might have been well considered as having taken the care of the horses upon themselves in the meantime.

Besides these two circumstances, the fact of the coachman wearing the defendants' livery with their consent, whereby they were the means of inducing third persons to believe that he was their servant, was mentioned in the course of the argument as a ground of liability, but cannot affect our decision. If the defendants had told the plaintiff that he might sell goods to their livery servant, and had induced him to contract with the coachman, on the footing of his really being such servant, they would have been liable on such contract; but this representation can only conclude the defendants with respect to those who have altered their condition on the faith of its being true. In the present case, it is matter of evidence only of the man being their servant, which the fact at once answers.

We are therefore compelled to decide upon the question left unsettled by the case of *Laugher v. Pointer*, in which the able judgments on both sides have, as is observed by Mr. Justice Story, in his book on Agency, page 406, "exhausted the whole learning of the subject, and should on that account attentively be studied." We have considered them fully, and we think the weight of authority, and legal principle, is in favour of the view taken by Lord Tenterden and Mr. Justice Littledale.

The immediate cause of the injury is the personal neglect of the coachman, in leaving the horses, which were at the time in his immediate care. The question of law is whether any one but the coachman, is liable to the party injured; for the coachman certainly is.

Upon the principle that *qui facit per alium facit per se*, the master is responsible for the acts of his servant; and that person is undoubtedly liable, who stood in the relation of master to the wrong-doer,—he who [\*275] had selected him as his servant, \*from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey; and whether such servant has been appointed by the master directly, or intermediately through the intervention of an agent authorized by him to appoint servants for him, can make no difference.

But the liability, by virtue of the principle of relation of master and servant, must cease where the relation itself ceases to exist: and no other person than the master of such servant can be liable, on the simple ground that the servant is the servant of another, and his act the act of another; consequently, a third person entering into a contract with the master, which does not raise the relation of master and servant at all, is not thereby rendered liable; and to make such person liable, recourse must be had to a different and more extended principle, namely, that a person

is liable not only for the acts of his own servant, but for any injury which arises by the act of another person, in carrying into execution that which that other person has contracted to do for his benefit. That, however, is too large a position, as Lord Chief-Justice Eyre says in the case of *Bush v. Steinman*, 1 Bos. and P. 404, and cannot be maintained to its full extent, without overturning some decisions, and producing consequences which would as Lord Tenterden observes, "shock the common sense of all men;" not merely would the hirer of a post-chaise, hackney-coach, or wherry on the Thames, be liable for the acts of the owners of those vehicles if they had the management of them, or their servants if they were managed by servants, but the purchaser of an article at a shop, which he had ordered the shopman to bring home for him, might be made responsible for an injury committed by the shopman's carelessness, whilst passing along the street. It is true that there are cases—for instance, that of *Bush v. Steinman*, *Sly v. Edgeley*, 6 Esp. 6, and others, and perhaps amongst them may be classed the recent case of *Randleston v. Murray*, in which the occupiers of land or buildings have been held responsible for acts of others than their servants, done upon, or near, or in respect of their property. But these cases are well distinguished by my brother Littledale, in his very able judgment in *Laugher v. Pointer*.

\*The rule of law may be, that where a man is in possession of fixed property, he must take care that his property is so used or [\*276] managed, that other persons are not injured; and that, whether his property be managed by his own immediate servants, or by contractors with them, or their servants. Such injuries are in the nature of nuisances: but the same principle which applies to the personal occupation of land or houses by a man or his family, does not apply to personal moveable chattels, which, in the ordinary conduct of the affairs of life, are intrusted to the care and management of others, who are not the servants of the owners, but who exercise employments on their own account with respect to the care and management of goods for any persons who choose to intrust them with them. It is unnecessary to repeat at length the reasons given by my brother Littledale for this distinction, which appear to us to be quite satisfactory; and the general proposition above referred to, upon which only can the defendants be liable for the acts of persons who are not their servants, seems to us to be untenable. We are therefore of opinion that the defendants were not liable in this case, and the rule must be made absolute to enter a verdict for the defendants on the second issue.

Rule absolute.

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## II.—RAPSON v. CUBITT.

April 2, 1842.—E. 9 Mees. & W. 710.

CASE.—The declaration stated, that before and at the time of the committing of the grievances, &c., the plaintiff had been and was the butler, and his wife the housekeeper of a certain club called the Clarence  
AUGUST, 1858.—13

Club; that the defendant had been and was retained and employed to execute certain alterations and improvements in the club-house, and, as part thereof, to make certain alterations and improvements in the gas-apparatus and gas-lights therein: and that the defendant made the said last mentioned alterations with such gross negligence and carelessness, [\*277] that by means thereof the gas escaped and exploded with \*such force and violence as greatly to burn, wound, and otherwise injure the plaintiff and his wife. Pleas, first, not guilty; secondly, that the defendant was not retained and employed to execute the said alterations and improvements, and, as part thereof, to make the said alterations in the gas-apparatus and gas-lights, in manner and form, &c.: on which issues were joined.

At the trial before Lord Abinger, C. B., at the London sittings after the last Michaelmas Term, it appeared that the defendant, a builder, had contracted with the committee of the Clarence Club to make extensive alterations and improvements in the club-house; and amongst the rest, to prepare and fix the necessary gas-fittings. The defendant made a sub-contract with a person of the name of Bland, a gas-fitter, to execute this latter portion of the work, and it was accordingly performed by Bland. In consequence of the omission of Bland, or some of his servants, to turn off the gas from a pipe on the staircase, a large quantity of it escaped therefrom and exploded, very seriously injuring the plaintiff and his wife. It was objected for the defendant (amongst other things) that he was not liable, in an action of tort, for the negligent acts of the sub-contractor Bland. The lord chief-baron inclined to this opinion, but declined to non-suit; and in summing up, directed the jury to consider whether the injury occurred through the negligence of the defendant, or of any person employed by him; and the jury found a verdict for the plaintiff, damages £500, leave being reserved to the defendant to move to enter a non-suit.

*Biggs Andrews* having obtained a rule *Nisi* accordingly, citing *Stone v. Cartwright*, 6 T. R. 411, and *Bush v. Steinman*, 1 Bos. and P. 404.

*Platt, Saunders*, and *Sir J. Bayley* now showed cause.—The defendant is responsible for the negligence of Bland, who was employed by him. The case falls within the principle of *Witte v. Hague*, 2 Dowl. and R. 33, where an engineer, who was employed to construct a steam-engine boiler, was held liable for the consequences of an explosion produced by [\*278] the insufficiency \*of the materials, the boiler being under the management of his servants. [ALDERSON, B.—There the engine was worked by the man who had misconstructed it. PARKE, B., referred to *Quarman v. Burnett*, 6 M. and W. 499.] In *Randleson v. Murray*, 8 Ad. and E. 109; 3 N. and P. 239, the defendants, who were warehousemen, engaged a master porter to lower a barrel of flour from their warehouse; and during the process of lowering it, the barrel fell and injured the plaintiff, owing to the defectiveness of a rope furnished by the master porter: the defendants were held to be liable for the injury. That was equally with the present, the case of a contract; and shows that the servant, for whose acts the employer is liable, does not mean a menial servant, but any one who is performing a service for another by

whom he is employed. So, in *Bush v. Steinman*, the owner of a house, who had contracted with a workman for the repair of it, was held to be responsible for an injury occasioned by the negligence of a sub-contractor. Heath, J., there says,—“I found my opinion on this single point, that all the sub-contracting parties were in the employ of the defendant.” So also, in *Matthews v. The West London Waterworks Company*, 3 Campb. 408, it was held that an action might be maintained against the company by a person who, in passing along the street, had been injured by reason of the negligence of workmen employed by persons who had contracted with the company to lay down water-pipes. [Lord ABINGER, C. B.—There the defendants caused their sub-contractor to commit a public nuisance.] In *Bates v. Pilling*, 6 B. and Cr. 38; 9 D. and R. 44, the general principle was recognized, that any one who employs another to do an act, in the course of which he commits a trespass, is equally liable with him.

*B. Andrews* and *J. Henderson*, contra, were stopped by the court.

Lord ABINGER, C. B.—The rule must be absolute to enter a non-suit. The injury was occasioned by the negligence of Bland, who did not stand in the relation of servant to the defendant, but was merely a sub-contractor with him; and to \*him the plaintiff must look for re- [\*279] dress. I think the true principle of law, consistent with common sense, was laid down in the case of *Quarman v. Burnett*, in which all the previous cases on this subject were cited and considered, and some distinguished and some overruled. I have always been of the same opinion, and therefore see no reason for departing from that decision.

PARKE, B.—I am of the same opinion. The plaintiff has his remedy against Bland, whose negligence was the cause of the injury; if he attempts to go further, and to fix the defendant, it can only be on the ground of Bland's being the servant of the defendant; but then the obvious answer is, that Bland was only a sub-contractor to do certain of the works, and that the relation of master and servant did not subsist between him and the defendant. The true rule on this subject was laid down by this court in the case of *Quarman v. Burnett*, which is directly in point, and cannot be distinguished from the present case. The court there said,—“The liability by virtue of the principle of relation of master and servant, must cease when the relation itself ceases to exist; and no other person than the master of such servant can be liable, on the simple ground that the servant is the servant of another, and his act the act of another; consequently, a third person entering into a contract with the master, which does not raise the relation of master and servant at all, is not thereby rendered liable.” And again,—“It is true that there are cases—for instance, that of *Bush v. Steinman*, *Sly v. Edgeley*, 6 Esp. 6, and others,—and perhaps amongst them may be classed the recent case of *Randleson v. Murray*, in which the occupiers of land or buildings have been held responsible for acts of others than their servants, done upon, or near, or in respect of their property. But those cases are well distinguished by my brother Littledale, in his very able judgment in *Laugher v. Pointer*, 5 B. and Cr. 547; 8 D. and R. 559. In that case

he says,—“The rule of law may be, that in all cases, where a man is in possession of fixed property, he must take care that his property is so used and managed that other persons are not injured; and that, whether [ \*280 ] his property be managed by his \*own immediate servants, or by contractors or their servants. The injuries done upon land or buildings are in the nature of nuisances, for which the occupier ought to be chargeable, when occasioned by any acts of persons whom he brings upon the premises. The use of the premises is confined by the law to himself, and he should take care not to bring persons there who do any mischief to others.” The case of *Quarman v. Burnett* has been approved of in its main principles by the Court of Queen’s Bench, in the case of *Milligan v. Wedge*, 12 Ad. and Ell. 737; 4 P. and D. 714. There a butcher had employed a licensed drover to drive home a bullock he had bought at Smithfield market, and the drover’s boy, by his negligent driving, had allowed the bullock to run into the plaintiff’s show-room, where it did considerable damage; it was held that the owner of the bullock was not liable for the damage; and Lord Denman there said,—“In *Randleston v. Murray*, the work to be done was necessary work done on the premises; the owner would have been liable if he had used his own servants and his own tackle; by hiring a porter and his tackle for a day he could not exempt himself from that liability.” Lord Denman there seems to adopt the distinction which this court, in *Quarman v. Burnett*, said ought to be taken. If a man has anything to be done on his own premises, he must take care to injure no man in the mode of conducting the work. Whether he injures a passenger in the street, or a servant employed about his work, seems to make no difference. I think, therefore, that as *Bland* was a sub-contractor, and not the servant of the defendant, the latter is not liable, and the rule for a non-suit must be made absolute.

ALDERSON, B., and ROLFE, B., concurred.

Rule absolute.

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[ \*281 ] \*III.—*MCLEAN v. RUSSELL.*

March 9, 1850.—S. 12 D. 887.

*RUSSELL, MACNEE, AND COMPANY*, the proprietors of a house in Prince’s Street, Edinburgh, contracted with *Gilfillan and Jackson* for the execution of alterations upon it. *Gilfillan and Jackson* entered into a sub-contract with *James Tait* to do the plaster-work.

The Edinburgh Police act provides, that where it shall be necessary, in course of building or repairing any house within the streets of the city, to deposit materials or form any erection on the street, an application for warrant so to occupy the street shall be made to the Paving Board, and on its being obtained, the space so occupied shall, at the expense of the party making the operations, or causing the same to be made, be fenced in, and lamps kept burning at each end of it from sunset to sunset, so that the inhabitants may incur no risk. A warrant having been obtained, the portion of the street extending opposite the whole frontage



of the house under repair, was duly fenced in by the party who contracted for the mason-work. At the east end of this erection Tait deposited a heap of lime, without taking any of the precautions against accidents provided by the police act. The husband of the pursuer, who was a coach-hirer, drove his coach into this heap of lime, and was thrown off his seat and killed on the spot.

The pursuer, his widow, raised an action, concluding against Russell, Macnee, and Company, the proprietors of the house, Gilfillan and Jackson the contractors, and Tait the sub-contractor, by whose negligence the accident was occasioned, jointly and severally, for £600 of damages.

Separate issues were sent to the jury against each set of defenders, that against Russell, Macnee, and Company being in the following terms :—

“ It being admitted that the defenders, Messrs. Russell, Macnee, and Company, were in January, 1848, proprietors of the tenement, No. 106, Prince's Street, Edinburgh—

“ Whether, on or about the 17th day of January, 1848, the pursuer's late husband, Alexander M'Lean, received, in Prince's \*Street [ \*282 ] aforesaid, injuries in his person which caused his death, in consequence of the fault or negligence of the defenders, the said Russell, Macnee, and Company, or of any person or persons for whom the said defenders are responsible, to the loss, injury, and damage of the pursuer ?”

The issues against the other defenders were in the same terms, substituting the names of “ Gilfillan and Jackson,” and “ James Tait,” respectively, for “ Russell, Macnee, and Company.”

The jury found “ for the pursuer, damages £50, reserving for the decision of the court the points which have been raised as to the liability of the defenders, Russell and Macnee, and Gilfillan and Jackson.”

The pursuer moved the court to apply the verdict, and pleaded ;—The pursuer was entitled to bring her action against all the defenders, jointly and severally. Not only the party who undertakes to execute any operation, but also the party who directs and authorizes it, is liable to the public for its safe execution. *Mack v. Allan*, Feb. 17, 1832, 10 S. and D. 349 ; *Chapman v. Parlanc*, Feb. 25, 1825, 3 S. and D. 585 ; *Binnie v. Parlanc*, June 28, 1825, 4 S. and D. 122 ; *Rankin v. Dixon, &c.*, March 19, 1847, D. 1048 ; *Bush v. Steinman*, 1 Bos. and Pul. 404 ; *Sly v. Edgeley*, Feb. 19, 1806, 6 Esp. 6 ; *Matthews v. West London Waterworks Company*, June 10, 1813, 3 Camp. 402.

The contractor was under the control of his employers, and they were bound to see that the work was performed by him under due precautions ; and that the sub-contractors employed by him were careful and competent workmen. The proprietors were here in possession of the premises, and the operations were carried on under their constant supervision and control. It had no doubt been found in *Linwood v. Hathorn*, that where the operations were of a character from which no danger was to be reasonably apprehended, the proprietor was not liable for an accident caused by the negligence of his servants. But the opinion of all the judges there saved the case of dangerous operations ; and operations which re-

[\*283] quired the erection of \*obstructions in the thoroughfares of a large town, certainly partook of some danger. The same liability which attached to the proprietor attached to the principal contractor, who had directly employed the sub-contractor, by whose negligence the accident was occasioned. *Busk v. Steinman*; *Smith v. Milne*, July 6, 1814, H. L., 2 Dow, 390.

*Gilfillan and Jackson pleaded*;—There was no authority for holding that the principal contractor was liable for the negligence of the sub-contractors; the reverse had been found in England. *Rapson v. Cubitt*, April 2, 1842, 9 Mees. and Welsby, 710. No fault lay with the present defenders; for even supposing they were the parties who were bound to fence in the street, as required by the Police Act, that had been done. There was thus no culpability or negligence directly brought home to them; and under the issue it was necessary to establish such direct culpability or negligence. The blame lay entirely with Tait; and the present defenders were not liable for his negligence. The principle on which the master was held liable for the wrong-doing or negligence of his servant was, that the former could exercise a direct and immediate control over the latter, and could enforce his orders by dismissing the servant. But a contractor could not so deal with his sub-contractor. He had not the power of enforcing obedience, without which it would be iniquitous to involve him in a liability for the sub-contractor's negligence.

*Pleaded for Russell, Macnee, and Company*;—The pursuer maintained that they were liable, 1st, as proprietors of the tenement, the operations on which were the remote cause of the accident; and 2d, as employers responsible for the negligence of the persons employed by them. A proprietor might be liable for injuries resulting from any dangerous operations carried on by him. But here the operation was of an innocent and ordinary character; it had been entrusted to competent and skilful contractors; and the proprietors could not be held liable, unless it were proved that they were aware that the contractors were executing the work in a reckless and dangerous manner. *Rankin v. Dixon*, ut supra; *Weston v. Tailors of \*Potterrow*, July 10, 1839, 1 D. 1218. No [\*284] such proof had been attempted. On the contrary, the proof established that all the prescribed precautions had been taken. The heap of lime which caused the accident was not laid on their ground at all; nor was it necessarily connected with their operations, as Tait might have removed it and applied it to another purpose. When an accident is occasioned by operations from which no danger need reasonably be apprehended, the master's liability even for a proper servant is limited; it is presumed that he gave him a mandate to conduct the operation in a safe and legal manner, and he is not liable if the servant transgress that mandate. *Linwood v. Hathorn*, May 14, 1817, F. C., H. L., March 19, 1821, 1 S. Ap. Cases, 20; *Duke of Roxburghe v. Waldie*, March 1, 1822, 1 S. and D. 367; H. L., Feb. 10, 1825, 1 W. and S. 1; *Duncan v. Findlater*, July 18, 1837, 15 S. and D. 1304; June 19, 1838, 16 S. and D. 1150; H. L. Aug. 23, 1839, 1 Rob. 911.

Still more limited is the employer's liability for a contractor, over whom he has not the control which he has over a servant; and when the

damage is occasioned by a sub-contractor, with whom the original employer never came into contact, the case is *a fortiori*. It was not alleged that Tait had been authorized by the proprietors to lay the lime where he did, or that they had any power to prevent his doing so. The power of control was the foundation of the doctrine of liability in the law of Scotland; and the English authorities were inapplicable. In particular, the case of *Bush v. Steinman*, principally relied on by the pursuer, had been declared by the highest authority to be inapplicable to a Scotch case; and even in England that decision seemed to be overruled. *Duncan v. Findlater*, 1 M'L. and Rob. 939; *Laugher v. Pointer*, 1826, 5 Barn. and Cress. 547; *Randleson v. Murray*, April 21, 1838, 8 Ad. and El. 109; *Quarman v. Burnett*, 1850, 6 Mees. and Welsby, 499.

**LORD PRESIDENT.**—In this case, counsel having been fully heard upon the application of the verdict of the jury as to its effect in regard to the three parties called by the pursuer as defenders in her action of assythment and damages against them, and in which the jury found her entitled to £50 of \*damages, reserving to the court to fix on [\*285] which the liability lay, and a great variety of authorities having been appealed to on both sides by Messrs. Russell, Macnee, and Company, the proprietors of the subjects under repair, Messrs. Gilfillan and Jackson, the contractors for the whole repairs, and Mr. Tait, the sub-contractor for the plaster-work of the premises—the court took time to consider their judgment.

I have accordingly examined the cases that have been referred to on both sides, both as decided in our own courts and in those of England; and, after full consideration, I have come to the conclusion, that no decree of the damages here awarded ought to be given against any of the parties except Tait, the sub-contractor.

This party having had occasion for a quantity of lime to complete the plaster-work of the buildings in question, in terms of his sub-contract with Gilfillan and Jackson, deposited, or caused to be deposited, not within the space duly set apart, fenced, and lighted, as a shed for the materials requisite for the repairs directed to be executed by Gilfillan and Jackson, the contractors employed by Messrs. Russell, Macnee, and Company, but upon a part of the street adjoining, no doubt, to the shed, but which was neither fenced nor lighted, when the deceased drove up with his cab, and his horse having driven into the heap, he was thrown out and mortally injured, and afterwards died in consequence. Tait having been included as one of the defenders against whom, as conjunctly and severally liable, the conclusion of the action of the pursuer, the widow of the deceased, was directed, I can have no doubt of the propriety of decerning against him for the damages found due by the verdict. But on a careful review of the decisions both in this court and in England, I am of opinion that there are no sufficient grounds in law for subjecting either of the other two defenders in the damages found due to the pursuer.

Keeping in view that there are no special circumstances whatever to bring Messrs. Russell, Macnee, and Company, the proprietors, or Gilfillan and Jackson, the contractors with them, into any immediate connexion

or contact with what unquestionably occasioned the fatal occurrence, that the one only directed their premises to be repaired, and that the others [\*286] \*entered on its execution, with the full sanction of the municipal authorities, their liability for what must be held as the wrongful and negligent act of Mr. Tait, cannot according to our decisions, be maintained.

The leading case in regard to an attempt to sustain the liability of the owner of property, and of persons to a certain extent acting under him, or in his alleged employment, is that of *Linwood v. Hathorn*, decided in this court, and affirmed in the house of lords, in which, for the cutting of a tree on his estate, a proprietor was found not liable, though a death had followed from the operation carried on by his servants, or those employed under him, though no doubt questions were raised on the proof as to how far he had sanctioned the particular act. I shall not stop to examine the particulars of that case, with which I was fully conversant, I having both tried the unfortunate wood-cutter in the Criminal Court, and afterwards decided the civil action of assythyment; but I refer to it as containing much discussion on the extent of liability in questions of this nature, and reference to other cases. It will however be found, that in his judgment in the case of *Findlater v. Duncan*, 23d August, 1839, regarding the liability of road trustees, Lord Chancellor Cottenham particularly referred to this case of *Linwood*, in regard to which he thus expressed himself:—"So far from finding any principle in the law of Scotland for making the liability of persons for the acts of others acting under their presumed authority greater than it is in this country, I find the rule laid down in *Linwood v. Hathorn*, by a majority of the judges, much more restrictive of such liability than the rule adopted in the case of *Bush v. Steinman*."

Now, here there is no indication of a doubt of the soundness of the principle adopted by us in the case of *Linwood*; and the same learned lord, on a careful and minute examination of all the cases that had occurred in Scotland, beginning with that of *Innes v. Magistrates of Edinburgh*, 1st Feb., 1798, M. 13, 189, and coming down to the latest in date, gave a full and distinct opinion, that the defenders, the road trustees, were not liable for the accident occasioned by the gross neglect of those under them in the management of the roads in question,—no [\*287] doubt keeping in view that the road funds could not be made \*available for their relief under the statutes. It was in the same case also that Lord Brougham, in concurring with the lord chancellor, gave it as his confident opinion, that, according to the law of Scotland, a judgment similar to that of *Bush v. Steinman* would not have been given in the Scottish courts.

But this very case of *Bush v. Steinman* is that mainly relied on in the present case for supporting the claim of liability both of Russell and Macnee, the proprietors, and Gilfillan and Jackson, the contractors. I have perused that case, as reported in *Bosanquet and Puller*, with all due attention, and I have certainly arrived at the same conclusion regarding it as that of Lord Brougham, and know of no case in which liability has been attached to a proprietor for an accident caused by the negli-

gence, not of a contractor with that proprietor for work on his property, nor of a sub-contractor, but of a fourth party employed by the sub-contractor to bring materials, and who had negligently laid them down in a road, where an accident occurred.

But, looking to the various subsequent cases which have followed that of *Bush v. Steinman*, decided in the Common Pleas in the time of Chief-Justice Eyre, above fifty years ago, and seeing that, from the very first, its soundness was questioned, and its doctrine greatly limited, in the opinions of Chief-Justice Abbott (Lord Tenterden,) and J. Littledale, and that the same hesitation has been followed by other judges in the various later cases reported in the volumes of Campbell, Espinasse, Meeson and Welsby, Barnewall and Cresswell, and Adolphus and Ellis, all of which I have perused, the result appears to me to be that the authority of *Bush v. Steinman* is greatly impaired, and that the true state of the law of England cannot be safely held by us as expounded by that solitary decision. I shall content myself with quoting only the words of Mr. Baron Parke in his judgment in the case of *Rapson v. Cubitt*. In that case, Baron Parke, concurring with Lord Abinger and Barons Alderson and Rolfe, thus expresses himself, where action was brought against contractors for repairing a club-house, and who had a sub-contract with a gas-fitter, whose negligence had caused an explosion to the injury of the \*plaintiff:—"The true rule on this subject was laid down by this court in the case of *Quarman v. Burnett*, which is [\*288] directly in point, and cannot be distinguished from the present case. The court there said—"The liability, by virtue of the principle of relation of master and servant, must cease when the relation itself ceases to exist; and no other person than the master of such servant can be liable, on the simple ground, that this servant is the servant of another, and his act the act of another—consequently a third person entering into a contract with the master, which does not raise the relation of master and servant at all, is not thereby rendered liable." And in the case of *Miligan v. Wedge*, 12 Adol. and Ellis, 737, against the owner of a bullock, who had employed a licensed drover to drive it from Smithfield, and the drover employed a boy, in consequence of whose carelessness the bullock injured the plaintiff's property, Coleridge, J., on the point as to 'who the person is that did the injury,' says—"The true test is, to ascertain the relation between the party charged and the party actually doing the injury. Unless the relation of master and servant exist between them, the act of the one creates no liability in the other. Apply that here. I make no distinction between the licensed drover and the boy; suppose the drover to have committed the injury himself. The thing done is the driving. The owner makes his contract with the drover that he shall drive the beast, and leaves it under his charge, and then the drover does the act. The relation, therefore, of master and servant, does not exist between them.'"

Now, such being what I consider to be the true state of the law of England on this subject, I can find no sufficient authority in it for leading us to adopt a principle of liability which can reach the case either of the contractors or those that employed them—and, therefore, that the

pursuer can claim her damages only against Tait, the person who truly was the cause of the injury to her husband. I am inclined, however, to find that no expenses should be awarded against her.

LORD MACKENZIE.—I am of the same opinion, that the liability attaches wholly to Tait. In this case the liability is not alleged to [\*289] attach on account of any *culpa* of either Russell \*and Macnee, or Gilfillan and Jackson. The only ground on which it was said they were liable, was, that the former firm are the proprietors of the house under repair, and the latter the principal contractors. I am unable to adopt those grounds as satisfactory. The general rule of law is *culpa tenet suos auctores*. Men are answerable for themselves, not for others. No doubt that rule, if carried to its full extent, would exempt the master from responsibility for his servants; but we do not carry it so far. Every master is liable for what is done by his servants in his employment. It is said that this principle is derived from the Roman law. If so, it was not very accurately copied; for by the Roman law, the servants were slaves, and had no *persona*. The action for amount of injury done by them was the *actio noxalis*, and if the master gave up the *noxæ*, he was free. That principle, however, exists in our law to a certain extent, and I am not inclined to extend it beyond servants. It is said there was a constructive *culpa* in employing careless persons. It is perfectly vain to say that any such blame can attach to a man who employs responsible tradesmen to execute harmless repairs on his house, or in these persons contracting with another to do part of the work. Therefore that can be no ground of blame; and there is no reason to extend the master's liability for servants to contractors. The cases quoted by your lordship are quite in point. On the whole, I have no doubt that the rule cannot be extended to a case of this description. The case of damage done to a neighbouring tenement is inapplicable, because that generally arises from dangerous operations which are culpable, unless precautions are taken to secure the neighbourhood from damage. There was nothing culpable here in the conduct of any one but Tait. He had authority to lay down the lime before the house, but not in the place where he did. In Linwood's case the master was not held liable even for the servant, where the operation was such that no blame could attach to him; and in Duncan v. Findlater, the house of lords applied the same rule in the case of road trustees, whose labourer was alone to blame. On the whole, I am not inclined to carry the doctrine of liability any further than to servants. The cases in which it was carried further were all very special.

[\*290] \*LORD FULLERTON.—I am of the same opinion. I go exactly on the grounds stated by your lordship, and particularly on the special facts of this case. The question put to the jury was, Whether the accident occurred through the fault or negligence of the defenders? It was put as to each of the defenders separately. It is quite plain that the jury felt that the person to whom the mischief was immediately brought home was liable; and accordingly they found Tait liable. The only question now is, whether, besides him, the employer and principal contractor are also liable; in short, whether Tait is to be held as a ser-

vant for whom these parties are responsible? That must depend on the question whether the operation was in the least degree hazardous. If it were so the employer might be liable, although he had devolved the actual execution of the operation on a contractor. But here there was nothing hazardous; and if a party employed to perform the very safe operation of plastering a house, executed it in a dangerous way, he only is blamable.

There is no question as to the fitness of Tait, and Gilfillan and Jackson, to undertake their contracts; and the question comes to be, whether the proprietor of a house *bona fide* employing a tradesman to execute repairs upon it, is to be held liable for everything done by the contractors,—whether he is bound to watch everything they do? I cannot carry the law so far as that.

I think the case of *Linwood v. Hathorn* quite in point. In that case both the master and servants were cited; but, as regards a servant, the employer is in a much more unfavourable position than as regards a contractor. The master is bound to watch over the doings of the servants, and their acts are his. This is very different from his position with regard to a person duly qualified, who has been employed as a contractor.

Then as to *Bush v. Steinman*, I think the courts of England have nibbled at the case bit by bit, until, though it stands in the books, its effect is now entirely gone; at any rate it is entirely inapplicable in Scotland. Therefore, on the whole, I concur with your lordships.

LORD CUNINGHAME declined, not having been present at the argument.

\*The court pronounced the following interlocutor:—"Decern against the defender, James Tait, for payment of £50 in name [\*291] of damages; assoilzie the defendants, Russell, Macnee, and company, and also the defenders, Gilfillan and Jackson, from the conclusions of the action, and decern: Allow the decree against the defender, James Tait, to be extracted *ad interim*: Find the defender, James Tait, liable in the expenses incurred by the pursuer, including the expenses of the trial, but not in any expenses incurred after the trial."

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A PRINCIPAL IS NOT LIABLE FOR THE DAMAGE OCCASIONED BY HIS AGENT IN ANY MATTERS BEYOND HIS AGENCY, NOR IS A MASTER LIABLE FOR THE WILFUL AND MALICIOUS ACTS OF HIS SERVANT, ALTHOUGH COMMITTED BY HIM WHILE ACTING IN THE SERVICE OF HIS MASTER.

### I.—M' MANUS v. CRICKETT.

Nov. 26, 1800.—E. 1 East, 106.

THIS case was very much discussed at the bar, upon a motion to set aside a verdict for the plaintiff and enter a nonsuit, by Gibbs and Wood, against the rule, and Garrow and Giles, in support of it. The court

took time to consider of their judgment ; and afterwards entered so fully into the cases cited and the arguments urged at the bar, that it is unnecessary to detail them in the usual form.

Lord KENYON, C. J., now delivered the unanimous opinion of the court.

This is an action of trespass, in which the declaration charges that the defendant with force and arms drove a certain chariot against a chaise in which the plaintiff was riding in the king's highway, by which the plaintiff was thrown from his chaise and greatly hurt. At the trial it appeared in evidence that one Brown, a servant of the defendant, wilfully drove the chariot against the plaintiff's chaise, but that the defendant was not himself present, nor did he in any manner direct or assent to the act of the servant, and the question is, if for this [ \*292 ] wilful and designed act of the servant an action of trespass lies against the defendant his master? As this is a question of very general extent, and as cases were cited at the bar, where verdicts had been obtained against masters for the misconduct of their servants under similar circumstances, we were desirous of looking into the authorities on the subject before we gave our opinion ; and after an examination of all that we could find as to this point, we think that this action cannot be maintained. It is a question of very general concern, and has been often canvassed ; but I hope at last it will be at rest. It is said in Bro. Abr. tit. Trespass, pl. 435, " If my servant contrary to my will chase my beasts into the soil of another, I shall not be punished." And in 2 Roll. Abr. 553, " If my servant without any notice put my beasts into another's land, my servant is the trespasser and not I ; because by the voluntary putting of the beasts there without my assent he gains a special property for the time, and so to this purpose they are his beasts." I have looked into the correspondent part in Vin. Abr., and as he has not produced any case contrary to this, I am satisfied with the authority of it. And in Noy's Maxims, ch. 44, " If I command my servant to distrain, and he ride on the distress, he shall be punished, not I." And it is laid down by Holt, C. J., in *Middleton v. Fowler*, Salk. 282, as a general position, " that no master is chargeable with the acts of his servant, but when he acts in the execution of the authority given him." Now when a servant quits sight of the object for which he is employed, and without having in view his master's orders pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and according to the doctrine of Lord Holt his master will not be answerable for such act. Such upon the evidence was the present case : and the technical reason in 2 Roll. Abr., with respect to the sheep applies here ; and it may be said that the servant by wilfully driving the chariot against the plaintiff's chaise without his master's assent gained a special property for the time, and so to that purpose the chariot was the servant's. This doctrine does not at all militate with the cases in which a master has been holden liable for the mischief [ \*293 ] arising from the \*negligence or unskilfulness of his servant who had no purpose but the execution of his master's orders ; but the form of those actions proves that this action of trespass cannot be main-



tained : for if it can be supported, it must be upon the ground that in trespass all are principals ; but the form of those actions shows, that where the servant is in point of law a trespasser, the master is not chargeable as such ; though liable to make a compensation for the damage consequential from his employing of an unskilful or negligent servant. The act of the master is the employment of the servant ; but from that no immediate prejudice arises to those who may suffer from some subsequent act of the servant. If this were otherwise, the plaintiffs in the cases mentioned in 1 Lord Raym. 739, (one where the servants of a carman through negligence ran over a boy in the streets and maimed him ; and the other, where the servants of A. with his cart ran against the cart of B. and overturned it, by which a pipe of wine was spilt ;) must have been nonsuited from their mistaking the proper form of action, in bringing an action upon the case, instead of an action of trespass ; for there is no doubt of the servants in those cases being liable as trespassers, even though they intended no mischief ; for which, if it were necessary, *Weaver v. Ward* in Hobart, 134, and *Dickinson v. Watson* in Sir Thomas Jones, 205, are authorities. But it must not be inferred from this that in all cases where an action is brought against the servant for improperly conducting his master's carriage, by which mischief happens to another, the action must be trespass. *Michael v. Allestree* in 2 Levinz, 172, where an action on the case was brought against a man and his servant for breaking a pair of horses in Lincoln's Inn Fields, where being unmanageable they ran away with the carriage and hurt the plaintiff's wife, is an instance to show that trespass on the case may be the proper form of action. And upon a distinction between those cases where the mischief immediately proceeds from something in which the defendant is himself active, and where it may arise from the neglect or other misconduct of the party, but not immediately, and which, perhaps, may amount only to a nonfeasance, we held in *Ogle v. Barnes*, 8 Term Rep. 188, that the plaintiff was entitled to recover. The case of *Savignac and Roome*, 6 Term Rep. 125, \*which was much pressed as supporting this action, came before the court on a motion in arrest [\*294] of judgment ; and the only question decided by the court was, that the plaintiff could not have judgment, as it appeared that he had brought an action on the case for that which in law was a trespass ; for the declaration there stated that the defendant by his servant, wilfully drove his coach against the plaintiff's chaise. *Day v. Edwards*, 5 Term Rep. 648, was also mentioned ; which was an action on the case, in which the declaration charged the defendant personally with furiously and negligently driving his cart, that by and through the furious, negligent and improper conduct of the defendant the said cart was driven and struck against the plaintiff's carriage : and on demurrer the court were of opinion, that the fact complained of was a trespass. And in the last case that was mentioned of *Brucker v. Froment*, 6 Term Rep. 659, the only point agitated was, Whether evidence of the defendant's servant having negligently managed a cart supported the declaration, which imputed that negligence to the defendant ? and the court with reluctance held that it did, on the authority of a precedent in Lord Raymond's

Reports 264, of *Turberville and Stamp*. In none of these cases was the point now in question decided; and those determinations do not contradict the opinion we now entertain, which is, that the plaintiff cannot recover, and that a nonsuit must be entered.

PER CURIAM.—Rule absolute for entering a nonsuit.

## II.—CROFT v. ALLISON.

June 25, 1821.—E. 4 B. and Ald. 590. Eng. Com. Law. Reps., vol. 6.

THE declaration stated, that the plaintiffs were the owners and proprietors of a certain chariot, then lawfully being and standing in a certain public highway, and that the defendant was possessed of a certain coach and horses, under the care and government of a servant, who was then driving the same along the highway; and that the defendant, by [\*295] his said servant, so \*carelessly and improperly drove, governed, and directed his said coach and horses, that, by the carelessness, negligence, and improper conduct of the defendant, by his servant, one of the fore-wheels of the coach struck and damaged the said chariot. Plea, general issue.

At the trial it appeared that the plaintiffs, who were livery-stable keepers, had hired the chariot for the day of Messrs. Lambert and Bryant, who were coach-makers. The plaintiffs furnished the horses, and appointed the coachman, and then let it out to an individual for the day. It was stated in evidence, that the cause of the accident arose from the defendant's coachman striking the plaintiffs' horses with his whip, in consequence of which they moved forward, and the chariot was overturned. At the time when the horses were struck, the two carriages were entangled.

The Lord Chief-Justice, at the trial, left it to the jury to determine, whether the carriages had become entangled from the moving of the horses of the plaintiffs, which, previously to the accident, were standing still and without a driver, and he directed them to find for the defendant, in case they thought so, and that the whipping by the defendant's coachman was for the purpose of extricating himself from that situation. But he directed them to find for the plaintiffs, in case they were of opinion, that the entangling arose originally from the fault of the defendant's coachman. The jury found a verdict for the plaintiffs. And now

*Scarlett* moved for a new trial.—First, the plaintiffs cannot properly be called the owners and proprietors of the chariot, having only hired it of the real proprietors for one day; and if any but the real proprietors can be so called, the individual actually using the carriage at the time, might be much more properly called so than the present plaintiffs. Secondly; the injury arose from the act of the defendant's coachman, in whipping the plaintiffs' horses; now that was a wanton act on his part, for which he himself, and not his master, would be liable; and the [\*296] declaration which charges, that, by the carelessness, \*negligence, and improper conduct of the defendant's servant, the accident happened, is not supported by the proof of a wanton act.

**PER CURIAM.**—As to the first point, it has never been supposed that a mere passenger in a carriage can be considered as the owner and proprietor, so as to be entitled to bring this action. The plaintiffs, however, are something more, for they have not only hired the chariot for the day, but have appointed the coachman and furnished the horses. They may, therefore, be considered, for the purposes of this declaration, as the owners and proprietors of the chariot. As to the second point, the distinction is this; if a servant driving a carriage, in order to effect some purpose of his own, wantonly strike the horses of another person, and produce the accident, the master will not be liable. But if, in order to perform his master's orders, he strikes but injudiciously, and in order to extricate himself from a difficulty, that will be negligent and careless conduct, for which the master will be liable, being an act done in pursuance of the servant's employment. The case, therefore, has been properly left to the jury.

Rule refused.

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1. Although a master is liable in every case to a stranger for damages occasioned by his servant while acting within the scope of his employment, he is not liable by the law of England in the ordinary case to a servant for damage occasioned by a fellow-servant. The rule appears to be that a master is not liable in such a case if he has taken reasonable care to protect his servants from the risk of injury by associating them only with servants of ordinary skill and care; but that a servant when he enters the employment of another is held to run the risk arising from the negligence of his fellow-servants. In the case of *Priestly v. Fowler*, 3 Mees. and Wel. 1, it was held, that in the ordinary case a master is not liable to his own servant for the insufficiency of a vehicle in which he had been directed to go with certain goods, where the injury was proved to have arisen from overloading the van, and that it was so loaded with the master's knowledge. Lord Abinger \*observed, "The mere relation of master [\*297] and servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is no doubt bound to provide for the safety of his servant in the course of his employment to the best of his judgment, information, and belief. The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master. In fact, to allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he is bound to exercise on behalf of his master, to protect him against the misconduct or negligence of others who serve him, and which diligence and caution, while they protect the master, are a much better security against any injury the servants may sustain by the negligence of others engaged under the same master, than any recourse against his master for damages could possibly afford."

2. In *Hutchinson v. York, Newcastle, and Berwick Railway Company*, May 22, 1850, 19 L. S. Ex. 296, it was held that a master was not in general liable to an action at the suit of his servant, for injuries sustained in consequence of the negligence of a fellow-servant acting in his master's service; but that the master would be liable if the servant guilty of negligence was not a person of ordinary skill and care. In this case the question was, whether the defendants were liable for the injury occasioned to one of their own servants by a collision while he was travelling in one of their carriages in discharge of his duty as their servant? It was admitted by the court that the defendants would undoubtedly

have been liable if the party injured had been a stranger travelling as a passenger for hire. ALDERSON, B., who delivered the judgment of the court, observed,—“The case appears to us to be undistinguishable in principle from that of *Priestly v. Fowler*. The principle upon which a master is in general liable for accidents resulting from the negligence or unskillfulness of his servant, is that the act of his servant is in truth his own act. If the master is himself driving his carriage, and from want of skill causes injury to a passer by, he is of course responsible for that want of skill. If, instead of driving the carriage with his own hands, he employs his servant to drive it, that servant is but an instrument set in motion by the master, and whatever the servant does in order to give effect to his master's will, may be treated by others as the act of the master. So far there is no difficulty. Equally clear is it that though a stranger may treat the act of the servant as the act of his master, yet the servant himself [\*298] by whose negligence or want of skill the accident has occurred cannot, and therefore he cannot defend himself against the claim of a third person. Nor if by this unskillfulness he is himself injured can he claim damage from his own master, upon an allegation that his own negligence was in point of law the negligence of his master. The grounds of this distinction are so obvious as to need no illustration. The difficulty is as to the principle applicable to the case of several servants employed by the same master, and an injury resulting to one of them from the negligence of another. In such a case, however, we are of opinion that the master is not in general responsible. The servants are engaged in a common service, the duties of which impose a certain risk upon each of them, and in case of negligence on the part of one of them, the party injured knows that the negligence is that of his fellow-servant, and not of his master. He knew when he was engaged in the service that he was exposed to the risk of injury, not only from his own want of skill or care, but on the part of his own fellow-servant also; and he must be supposed to have contracted on the terms that, as between himself and master, he would run that risk. The principle is, that a servant when he engages to serve a master, undertakes as between himself and his master to run all the ordinary risks of the service, and this includes the risk of negligence upon the part of a fellow-servant when he is acting in the discharge of his duty as servant of him who is the common master of both. Though we have said that a master is not responsible generally to one servant for any injury caused to him by the negligence of a fellow-servant while acting in one common service, yet this must be taken with the qualification that the master shall have taken care not to expose his servants to unreasonable risk. The servant when he engages to run the risks of his service, including those arising from the negligence of his fellow-servants, has a right to understand that the master has taken reasonable care to protect him from risk by associating him only with persons of ordinary skill and care, and the real object of the plea in this case is to show that the defendants had discharged a duty, the omission to discharge which might have made them responsible to the deceased.” A judgment to the same effect was pronounced the same day in the case of *Wigmore v. Jay*.

3. The law of Scotland appears to differ from the law of England in the question of the liability of a master to a servant for injury sustained by a fellow-servant. In the case of *Gray v. Brassey*, Dec. 1, 1852, 15 D. 135, it was held that an action lies at the instance of a servant against his employer, founded on the alleged fault or negligence of a fellow-servant. In that case the servant was injured in consequence of a break which he was in the act of using having no [\*299] block upon it. In stepping on the break for the purpose of stopping a portion of a train of wagons which he had been desired to uncouple, the break slipped down with him, and he fell, when one of the wagons passed over him, and injured him so severely, that in order to save his life it was necessary to amputate his leg. The want of a block on the break was attributed to the culpable negligence of the superintendent of the railway, or of some other person for whom the defender was alleged to be responsible. The court found that the averments of the pursuer were relevant to entitle him to an issue for the trial of the cause. Lord President M'NEILL observed,—“In this case, a point is raised which is comparatively new to us; and recent decisions in the law of England

have been pressed on us, as leading to the conclusion that the interlocutor of the lord ordinary should be altered. My opinion is, that the interlocutor is right. This is a question of relevancy, and we must take the case as it is set forth by the pursuer on record. The case as set forth, is, 1st, That it was the duty of Brassey, the defender, to provide proper wagons, with proper breaks and proper blocks, and to see that they were kept in proper working order. 2d, That the defender neglected to do this, and that he, or rather his superintendent acting for him, and for whom he is responsible, ordered the pursuer to uncouple the wagons, at a time when, through the negligence of the defender or those acting for him, the break was not in proper working order. 3d, That in consequence of this negligence, the pursuer sustained the injuries libelled; and 4th, that Brassey ought to have been aware of the unsafeness of the machinery. All that is set forth in the summons; I do not say that is true. But if the pursuer makes out that it was the duty of Brassey to use proper precautions for the safety of his workmen,—to provide proper wagons in suitable working order, and with proper breaks and blocks,—that the pursuer in uncoupling some of the wagons, by order of Dixon, who was acting for the defender, had his leg broken—that he received this injury in consequence of there being no break, or of the break not being in proper working order—that this deficiency arose from the negligence of the defender, or of a servant for whom he was responsible—and that it was in the power of the defender to provide against such a deficiency; if the pursuer makes out all this, then I think he makes out a relevant case. But while I am of that opinion, I do not think we are to disregard the authorities. I think that our own authorities, if properly sifted, go to support the relevancy of the present action. I do not lay any weight on the case of Lord Keith v. Keir, 19th June, 1812, F. C., where the question was, whether the master was liable where the servant was acting contrary to his orders. That was an extreme case; but all the other authorities support the relevancy of this summons. Several English cases have been quoted to us, \*as showing that the [300] master is not liable for injury done by one servant to another. That is put to us as a general rule of the English law. I do not know whether it may be so; but the impression in my mind is, that these cases do not lay down any such general rule. The latest of them is the case of Hutchinson; and Baron ALDERSON, who tried that case, stated, 19 Law Journal, N. S. p. 229, ‘The principle upon which a master is in general liable for accidents is, that the act of the servant is in truth his own act;’ and he puts the case, that if a servant driving his master’s carriage, injures a passer by, the master is responsible, as if he were driving himself; ‘because it was his will that the servant should drive.’ He stated it as equally clear, that the servant by whose negligence the accident occurred, if himself injured, cannot claim damages from his master, upon an allegation that his own negligence was, in point of law, the negligence of his master. But in reference to the case of two servants, jointly engaged in the same service, he states it to be his opinion that if one of them be injured by the unskilfulness of his fellow-servant, he has no claim against the master. ‘He knew when he was engaged in the service, that he was exposed to the risk of injury, not only from his own want of skill or care, but on the part of his fellow-servant also; and he must be supposed to have contracted on the terms that, as between himself and his master, he would run that risk.’ I do not know that, with the exception of one or two words used, as we would think, in too general a sense, there is anything in this opinion from which I would dissent; although the principle on which I should hold liability to attach, in some of the cases put by way of illustration, is different from that on which Baron Alderson proceeds. Take the case, for instance, of two servants sent to drive cattle to market. If a stranger be injured by the negligence of one of them, the master is liable. To that doctrine I assent. On the other hand, the learned baron says, that if the servant injures himself by his own negligence, he has no claim against his master. I assent to that also, but on a different principle—because the injury was occasioned by the fault of the servant himself, and *culpa tenet suos auctores*. That is the first principle of the doctrine of reparation; and on it there has been ingrafted another principle, *qui facit per alium, facit per se*. But in giving effect to that second principle, we do not lose sight of the first. Then, if one of

the servants injure the other, is the master liable? Baron Alderson holds that he is not, because 'they have been both engaged in a common service, the duties of which impose a certain risk upon each of them.' Whether this doctrine is sound in the law of Scotland, must depend on the meaning given to the expression 'common service.' I apprehend that by that phrase must be understood, [\*301] not merely that they are \*servants of the same master, but that they are labourers engaged in the same service. I cannot assent to Baron Alderson's doctrine, if it is put on the ground, that the one servant is to be regarded as the master's right hand, and the other as his left, and that a man is not liable for injuries done to himself. Suppose my coachman drives over a man coming to my house with game from a poulterer, or vegetables from a market gardener, I would be liable in reparation; and I am not prepared to say that I would not be equally liable, if my coachman were to drive over my own gamekeeper or gardener. The person injured, and the person who causes injury, are no doubt both my servants; but they are not engaged in a common service, for they have each a totally distinct calling and occupation. In the late case of Rankin v. Dixon, Jan. 31, 1852, another principle was involved. In that case it was the duty of the master to provide a certain superintendence of his works, and as that superintendence was defective, the master was held liable in damages. No doubt the direct cause of the injury was the absence from the pit-mouth of a fellow-servant of the workman injured; but his absence arose from the want of proper superintendence. In the present case the pursuer libels that it was the duty of the defender to supply certain machinery,—that is to say, breaks and blocks,—that, although the pursuer was a servant of the defender's, it was not within his department to see that that machinery was provided; but that it was within the department of another servant for whom the defender is responsible,—that it was necessary for the safety of the servants in the pursuer's department that that machinery should be provided,—that they were entitled to rely on its being provided, and that by reason of its not being provided, the pursuer was injured. Now, if that be made out, the injury was occasioned by fault or negligence in a department with which the pursuer had no concern; and I think we have no case in our books which protects the master from liability, if such facts be made out. There were many very important observations made by the court in the case of Linwood; and I give every weight to the remark of Lord Glenlee, that, if the master was to be liable in every case, the work of the country cannot go on. But in that case the master was held free from liability on a ground altogether different from that which is pleaded here. In that case the court were sitting in judgment on the evidence, and they found that the servants were acting contrary to their master's orders; and the pursuer had obstructed the investigation, by calling persons, who should have been witnesses, as parties to the case. I cannot go along with the doctrine laid down by one of the judges, that all cases of this kind are cases of contract. But where servants have different departments of duty—where it is the duty of the master to provide for the safety of the servants employed \*in each department—and where injury is occasioned by the negligence of a servant in a distinct department;—in

fact, in such a case as the present will be if the pursuer's averments are substantiated, we are quite out of the rule of the case of Linwood. Nor are we within the case of Nisbett, for the question was entirely different. It arose out of the nice distinctions occasioned by the division of labour, which has been necessitated by the progress of trade; and the question was, whether the party who occasioned the injury was the servant of the defender. That was also the nature of the question in the case of Richmond v. Russell, Macnee, and Company."

Lord FULLERTON observed,—“I am of the same opinion. The defender's plea in law, on which we are called on to decide, is general, absolute, and unqualified. It goes very far, and would exclude almost every case of injury by a servant to his fellow-servant. A master or a contractor may give directions to a certain number of workmen, whose business is totally unconnected with driving wagons, to proceed to some place ten or twelve miles off, to do their work. Well, if he puts them into a wagon which proves insufficient, and the men are more or less injured, is there any ground for holding that he is not liable? I see no reason or principle for holding that he is not liable. If a railway con-

tractor treats his servants as passengers, are they not entitled to the same security, or, failing that, to the same remedy as other passengers? Looking to the statements made in this case, I do not think we run any risk in allowing an issue. I concur very much in your lordship's remark, that where parties employed in different kinds of work are called on to labour together, in some operation which combines both kinds of work, it may be difficult to define how far the master is liable to one servant for injury occasioned by the other. But the case, as set forth on the record, avoids that difficulty; because the statement is, that there was a want of proper machinery—that the party whose duty it was to see that proper breaks were provided, had neglected to do so. If it turn out that this man has done something evidently rash and dangerous, I do not know what view the jury may take. But taking the case before us as it stands, I do not think we can refuse an issue."

Lord IVORY observed,—“Substantially, I am of the same opinion. I do not desire to pronounce any judgment with reference to the principles or practice of the law of England; nor do I wish to lay down any abstract rules in reference to our own law. I confine myself entirely to the allegations of the pursuer in the case before us, without any consideration of what may be settled hereafter in other cases. The only hesitation I feel in regard to the present case, is as to the form of the interlocutor. I have no difficulty in finding that the pursuer has set forth a relevant case; but the interlocutor goes further, for it proceeds to negative an abstract \*proposition in law, and that in respect of a late decision in the other division. The plea which the interlocutor repels is, as Lord Fullerton remarked, broad, absolute, and unqualified, and it is because it is unqualified that I fear the judgment may do harm, if, by repelling the plea, it was meant to import, as I suppose it was, that although the master, in the choice of his servants, and in the sufficiency of his machinery, was altogether free from blame, he may still be liable for injury done to a workman. I am not prepared to go that length! I am rather inclined to adopt the rule laid down by Lord Mackenzie in *Strutton v. Addie, Miller, and Rankine*, 11 D. 1159. That was a case of injury from machinery, and Lord Mackenzie observed, ‘If the owner has used all the precautions that a careful man can do, that is enough. If he could prove that he employed the best engineers to examine his machinery, I could not find him liable for injury afterwards happening through latent deficiency.’ If that be sound as to machinery—if, when from some latent fault, which the owner has taken every precaution to discover, an accident arises, the owner is not liable—as I read our decisions; the same principle applies in the case of servants. If the master has employed servants capable of performing their duties, and such that no care on his part could make the risks of the service less, I am not prepared to go the length of holding that he is liable for injuries occasioned by irregularities on their part which he could not have foreseen. It is dangerous to argue on analogies in any case where liability is referable to some special principle. One of the analogies which have been referred to at the bar, is the case of a carrier; but in that case, the obligation arises from warranty—not from neglect of duty. Nor is it safe to go on the analogy of a man employing an agent, who does something for which the principal would be liable, had it been done by himself. There, too, the liability does not arise from neglect of duty, but from another principle known in law. So also in the case of tenancy;—the obligation of the tenant is to return the subjects in the same condition as he got them. If the subjects be destroyed by a fire, or other accident, for which he was not to blame, I am inclined to hold that he is not liable—but if the accident arise from his neglect or fault, he is liable, because his contract binds him. But there is nothing inherent in the contract of service—of *locatio operarum*—which implies any warranty further than this—that the master must use every precaution for the safety of his servants, that he would for the safety of third parties. The nearest analogy is that of an injury by a servant to a total stranger. There the claim of the party injured does not arise from any peculiarity in the contract of service—it is an equitable claim for reparation of an injury suffered at the hand of the master, or of one for whom he is responsible. In \*fact, none of these [304] analogies throw much light on this chapter of our law, which is singu-

larly ill 'redd up.' In all the cases, there are *dicta* which carry the law to an extreme length. In *Rankin v. Dixon*, for instance, the court seemed to go very much on a supposed warranty in the contract of service. I am inclined to hold that there is no such warranty in the law of Scotland. I don't think there is any higher warranty of the efficiency of fellow-servants, than of the sufficiency of machinery. A man who keeps a watch-dog is not *versans in illicito*; if he has satisfied himself of the dog's good temper, he is not liable for injury done by him even to a passer by; but if he is known to be vicious, the master is liable. Is the liability different if the dog injure his master's servant?—for the dog is a sort of fellow-servant. Then, if my carriage is upset, I am not prepared to say that, because the horses were mine, I am under any liability to the coachman. But if my footman be injured—then, as between servant and servant, how is the liability to go? If I am to be liable without any *culpa* of my own, for my servant, why should I be free from liability, when the servant's act is an infringement of my orders, or when, from some sudden weakness or frenzy, he is unable to put forth his strength, or does something which no man in his senses would do? I am rather inclined to say, that in such a case I would not be liable, because the injury was one which no carefulness on my part could prevent. If, therefore, I am to lay down any general doctrine, I would hold with Lord Mackenzie, in the case of *Sneddon*, that there must be *culpa* on the part of the master, but that *culpa levis* will do. The presumption may be, that the injury arose from *culpa* on the part of the master; but if the jury find that he had done all that man can do for the safety of his servants—that there was no *culpa* on his part, direct or indirect—I am not prepared to say that he is liable for injury done by one of his servants to another. Holding these opinions, I am not prepared to negative the defender's plea, in the absolute and unqualified terms of this interlocutor. At the same time, I think that, with the cautions expressed by your lordship, and looking to the allegations of the summons, and to the state of the law as laid down in previous cases—we are not called on to deal with any abstract question. We are not in the same position as the judges in England, for we have many such cases in our books, and, therefore, we need not look to questions of general policy, or to anything beyond the established rules of our law. I would, therefore, be inclined to adhere to the interlocutor under review, in so far as it finds 'that there are relevant allegations set forth by the pursuer to entitle him to an issue;' but I would like to see out of it the words, 'in respect of the judgment of the second division of the court, in the case of *Rankin or Neilson v. Dixon*, Jan. 31, 1852, \*because that would [ \*305] commit me to the extreme views thrown out in that case; I dread the use that may hereafter be made of our judgment, if it be framed in terms of the interlocutor.' LORD PRESIDENT.—"I entirely agree with Lord Ivory, that the pursuer must bring home in some way or other, fault or negligence to the master by himself, or some one for whom he is responsible."

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AN AGENT CANNOT BIND HIS PRINCIPAL BY A CONTRACT IN WHICH HE HAS OR CAN HAVE A PERSONAL INTEREST CONFLICTING, OR WHICH MAY POSSIBLY CONFLICT WITH THE INTEREST OF HIS PRINCIPAL, AND NO INQUIRY IS ALLOWED AS TO THE FAIRNESS OR UNFAIRNESS OF THE CONTRACT.

# I.—YORK BUILDINGS COMPANY v. MACKENZIE.

March 8, 1793.—M. 13719. House of Lords, May 13, 1795. 3 Paton, 378.

ON the bankruptcy of the York Buildings Company, Alexander



Mackenzie was appointed common agent in the ranking of the creditors on their estates in Scotland.

In 1779, the lands of Seaton, belonging to that company, were exposed to public sale, under the authority of the court, when the common agent purchased the first two lots at the upset price.

A reduction of this sale was brought by the company, on the two following grounds; 1st, That the defender, in consequence of holding the office of common agent, came under a legal disability of becoming the purchaser; 2dly, The pursuers alleged, that certain circumstances of the defender's conduct, at and previous to the sale, amounted to fraud, or at least to culpable negligence, which, in his situation of common agent, must have the effect of setting aside the purchase. This second ground of challenge was a mere question of fact, and made the subject of a voluminous proof, in which the pursuers failed. In support of the first ground, which resolved into an abstract point of law, it was

*Pleaded*;—1st, By the Act of Sederunt, 1756, which introduced the appointment of a common agent, and by the uniform subsequent practice, it is the duty of the person accepting of \*that office, to take a proof [\*306] of the value of the estate, to bring it to public sale, and to ascertain the interest of each creditor in the price. In taking these steps, he acts not only for behoof of the creditors at large, but of the common debtor, who, as he has not access to his funds, is deprived of the means of protecting his own interest. All parties concerned are presumed to place implicit confidence in his integrity, for if they were to watch over every step of his management, they might as well conduct the business without his assistance. As therefore the common agent is in reality the seller of the estate, and as the duties of seller and buyer are inconsistent with each other, Vinnius, b. 3, tit. 4, he cannot be allowed to unite the two characters in his person.

2dly, Besides, a common agent may also be considered as trustee for all concerned, and no trustee is allowed to purchase the subject of the trust, or at least if he does so, he is considered as holding it for behoof of the truster, that is, in the present case, for behoof of the pursuers and their creditors. This principle is recognised by the law of Rome, ff. lib. 18, tit. 1, l. 34, § 7; Matth. de Auct. 74; of England, 2 Abrid. Cases in Equity, 741; Fox v. Mackreth, stated in 3 Brown's Reports, 420; Whelpdale v. Cookson, 1747; 1 Vesey, 9; Bovey v. Smith; 1 Vernon, Nos. 58 and 139; Twining v. Morice, 1788; 2 Brown, 326; and of this country, 1 Stair, tit. 6, § 17; Durie, 28th February, 1632, L. of Ludquhairn; 17th February, 1732, Cochran, stated in 2 Dict. 492; Kilkerran, voce Husband and Wife, 19th June, 1745, Bee v. Biggar; Kames, 6th March, 1767, Earl of Crawford, 26th June, 1789, Wilsons.

3dly, And even although a common agent were not, strictly speaking, vested with either of these characters, it would be *contra bonos mores* to allow a common agent to purchase at the sale, as it would be laying him under such temptations to conceal the value of the subject, and afterwards to conduct the sale of it improperly, as his integrity might in many cases be insufficient to resist.

*Answered*;—1st, A common agent is no more the seller of the estate

than the lawyer who appears at the different callings of the process of ranking, or any other person employed in \*forwarding the business. The sale is the act of the law, and if the character of a seller is at all essential to it, the court itself, acting under the authority of the Statute 1690, c. 12, can alone be considered as possessing it.

2dly, The estates of the York Buildings Company were not conveyed in trust to the defender. His employment was limited to a particular purpose, namely, that of carrying on the process of ranking, and dividing the price among the creditors. He was therefore no more a trustee than a writer or solicitor, who is employed in any particular piece of business, who surely is not on that account disabled from purchasing the property of his employer.

But even if the defender could be viewed as a trustee in the strictest sense of the word, the purchase in question would not have been reducible on that account; for although a trustee cannot purchase the property of the truster by private bargain, there is no reason for extending the prohibition to the case where the subject is sold by a public auction fairly advertised, when, in consequence of the competition of purchasers, there is no possibility of his having an unfair advantage. And this must particularly be the case where the auction is carried on under the superintendence of the Supreme Court, where of course all the proceedings are attended with the most public notoriety. Accordingly, both by the civil law and our own, a tutor, who exercises the most sacred of all trusts, may purchase the goods of his pupil for his own behoof, when exposed to public sale; 1. 5, Cod. de Contrab. empt.; 1 Erskine, tit. 8, § 19. In like manner, a *creditor pignoratitius* in the Roman law obtaining the authority of a judge to sell a pledge by auction, for payment of his debt, might himself become the purchaser, Voet. lib. 20, tit. 5, § 3.

As to the authorities quoted by the pursuers from the law of England, they are either misunderstood, or do not apply to the present case. Indeed, it would seem, that the English are less scrupulous in this matter than we are in this country. By a late statute, 17 Geo. III. c. 20, it appears not only to be lawful for the proprietor exposing his goods by auction, either to bid himself, or to employ another to bid for him, but that he is even liberated from the duty on sales, if he become the purchaser.

[\*308] \*3dly, Admitting for a moment, that it is inexpedient to allow the common agent to purchase at the sale, as the law has not declared his doing so illegal, it is not a competent ground of reduction; for, in order to found a right of challenge at common law, it is necessary to prove, not merely that the situation is suspicious, but that fraud has actually been committed. If in any case the temptation to overreach, arising from the situation of parties, was a ground of reduction at common law, bargains between a member of the College of Justice and a litigant, concerning a depending law-suit, should have been reducible on that account; yet the legislature thought a positive enactment necessary to check this traffic; and even still, as the statute has not annexed nullity, but deprivation of office, as the penalty of contravention, such trans-

actions have uniformly been sustained; Fountainhall, 20th December, 1683, Purves.

Besides, from a search of the records, it appears, that since the year 1756, common agents have been offerers at judicial sales carried on under their direction in no less than 135 instances, in eighteen of which they became the purchasers, yet in no one case has this conduct been challenged, either on the head of fraud or legal disability; a circumstance which shows not only that the practice is in favour of the defender, but that the suspicion arising from his situation is altogether groundless.

After a hearing in presence, the lords "repelled the reasons of reduction."

But on advising a reclaiming petition, with answers, the court, by a narrow majority, "in respect Mr. Mackenzie was common agent when the sale of the two lots of Seaton in question took place, reduced the said sale."

The pursuers not being satisfied with the *ratio decidendi* of this last interlocutor, both parties reclaimed; and on advising the mutual reclaiming petitions, with answers and minutes, several judges observed, that a common agent had such advantages over other bidders, both in obtaining better information, and in other respects, that he ought not to be allowed to purchase: That as a lawyer cannot act for both parties, so neither can a common agent do justice both to the creditors, and to himself, if he intended to become the purchaser: That although \*he was not disabled by any municipal regulation, yet his disqualification was [\*309] founded on reason: That the circumstance of so many common agents having been offerers at sales, was an additional ground of suspicion, and showed the necessity of excluding them. And as the rule is universal, that no trustee can take advantage of a sale in his own favour to the prejudice of the truster, so neither can a common agent, whose situation in that respect must be considered as precisely similar.

On the other hand, a majority of the court were of opinion, that although it might be proper that an Act of Parliament, or Act of Sederunt should be made, prohibiting common agents from becoming purchasers in future; yet as at present they are under no legal disability, it would be equally contrary to justice, and to the principles of our law, to give a retrospect to such a regulation: That an apparent heir purchasing adjudications by private bargain, would not have been subjected in a passive title, previous to the Act 1695, c. 24, nor would a factor on a sequestrated estate buying a debt affecting it have been considered as entering into an illegal transaction before the Act of Sederunt, 25th December, 1708. And that the sale in question was valid on the very same principle.

The court, by a narrow majority, "assolized the defender, and in respect one of the reasons of reduction was a charge of fraud, found the pursuers liable in the expense of the defender's proof."

The case was appealed.

*Pleaded for the Appellants.*—The sale in question was *ipso jure* void and null, because the respondent, from his office of common agent, was under a disability and incapacity which precluded him from being a

purchaser. The office of common agent, in a ranking and sale, infers a natural disability, which, *ex vi termini*, imports the highest legal disability, because a law which flows from nature, being founded on the reason and nature of the thing, is paramount to all positive law. The principle is obvious. He cannot be both judge and party. He cannot be both seller at a roup and buyer; he cannot serve two masters. And [\*310] he that is entrusted with the interest of \*others ought not to make that business an object of interest to himself; and as one who has the power will be too ready to use it, as an opportunity for serving his own interest at the expense of those for whom he is instructed to act, no such purchase so made by him ought to have the countenance or support of law. The danger and temptation, from the facility and advantages for doing wrong, which a particular situation affords, does, out of mere necessity of the case, work a disqualification, nothing less than incapacity, being able to shut the door against temptation where danger is so imminent. The law has, therefore, wisely guarded against such temptation, by interposing the bar of disability in such situations. In the case of *Keech v. Sandford*, 31st October, 1726, Lord Chancellor King said,—“It may seem hard that the trustee is the only person of all mankind who might not have the lease; but it is very proper that rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease on a refusal to renew to *cestui que trust*.” And Lord Chancellor Hardwicke, in *Welpdale and Cookson*, in 1747, says, “He would not allow it to stand good, although another person, being the best bidder, bought it for him at a public sale. I know the dangerous consequence; nor is it enough for the trustee to say, you cannot prove any fraud, as it is in his own power to conceal it.”

The common agent in a judicial sale is an office of trust in the strictest sense of that term. His office is derived partly from the creditors who elect him, and partly from the court, who confirm by an act of court, his election; and he is responsible for the faithful discharge of his duties both to the one and to the other; and, consequently, falls within the rule of those cases. The same principle was recognised in the Roman law; and the law of Scotland stands on the same footing in regard to the acts of tutors, guardians, factors, and trustees, offices all of them of the same character with that of a common agent.

*Pleaded for the Respondent.*—The respondent's decree of sale, by which he possesses the estate in question, and which declares that the sale had been legally and orderly proceeded in, and adjudging him to be [\*311] the purchaser, ought to be a sufficient \*bar to this action. This express declaration of the decree is not words of mere style, but a judgment pronounced on facts, stated to the whole court, by one of their own number, appointed to witness and direct the proceedings. As matter of concluded record, it ought therefore not to be allowed to be redargued even if that, in point of fact, were possible, by lesser or parole testimony, as both incompetent and dangerous. In the law of Scotland, a decree of sale has hitherto been deemed the strongest and best title to land that could be adduced. No person thinks of inquiring further.

"If all parties are cited, it is an absolute and sovereign security." The regularity of the proceedings is not impeached; and if, in these circumstances, the present sale was set aside, the land rights of Scotland would be entirely shaken. The declaration of the court, as judge of the sale, that the common agent was the purchaser, and the adjudication of the estate to him as the highest bidder, implied that he was competent to bid, and of consequence to purchase. He did this in presence of the court, and in presence of the appellants. If he then did a thing which was in itself either illegal or improper, why did the court *pars judicis*, or the appellants, not object? It is obvious that the court would never have permitted its officer to do a thing which by law was considered illegal. They would never have awarded the estate to belong to him and his heirs for ever. Yet, nevertheless, it is maintained that this decree of sale is null and void. But the ground upon which this is rested the respondent humbly apprehends to be perfectly unmaintainable; because the respondent's holding the office of common agent inferred no incapacity to become purchaser. Such rule of disqualification is established by no statute and by no Act of Sederunt, or other regulation of court. The office has been known since 1756, when it was first instituted, but no doubt was ever entertained until the present question that a common agent might buy the estate so circumstanced; and where there has been a general opinion of this held, and the practice in conformity with that general opinion, and where the party has acted *optima fide*, the past acts of the court ought to remain undisturbed, leaving the legislature to do as to the future whatever expediency may dictate. It would be plainly wrong to make \*out a case here from the law of England; yet it is from analogy alone that the appellants hope [\*312] to succeed in the present case; but the English cases cited regard trusts, where the disqualification rests on the maxim, that one cannot be *auctor in rem suam*. In such cases, the trust is private, the act private, and hence the necessity of fencing the office with such safeguards; but here the office is a public judicial office, every act and step is public and judicial, patent to all, to be scrutinized by every one who had a mind. The English cases therefore do not apply, or bear out the doctrine, that the common agent is not *eo nomine* disqualified. Looking, therefore, to the fairness of the transaction, to the absence of all fraudulent design, of which the court unanimously acquitted him, to the appellants' own conduct in standing by, looking on and permitting him to buy the estate, without ever hinting disapprobation or dissent, and thereby confirming and homologating the sale; and, finally, looking to the time he has been allowed quietly to possess on the decree of sale, the same ought completely and absolutely to bar any further question.

After hearing counsel sixteen days in this case,

LORD THURLOW said, "My lords,—The proceedings in this cause, both in the court below and here, have drawn to a great length. That is not wonderful, considering that the reputation of the respondent had been supposed to be involved, and the largeness of the property at stake. It would be impossible for me, were I inclined, to pursue the argument

in all its points, or the evidence in all its bearings, with the precision it would require.

“ My lords,—The subject, if I understand it, depends on two single points :—The first is, that a period of eleven years elapsed since the cause of action arose,—that circumstance raised a strong prejudice in my mind. The second is, the circumstance of an action having been brought in 1784, in the manner in which it was, seemed to deserve a considerable degree of reprehension, and also, had a considerable effect upon my mind ; but it is absolutely necessary, in considering such topics as these, to apply them to some conclusion, and to examine with some accuracy in what manner they support them. It is said, the length [\*313] of time that has elapsed ought to entitle \*the respondent to a *décree*, exclusive of anything else, because he is not answerable for the length of time which has taken place, and is entitled to all the advantages possible to be derived on his part, in respect of the uncertainty of the evidence. Whatever evidence remains doubtful, the balance of the scale ought to go in favour of the respondent. I will go one step farther, to say, if any ground could be made of what they call homologation, that the consent and acquiescence for that length of time, would have gone a great way towards substantiating that principle, only rendering void the transaction in one part ; but, beyond that, it is impossible to apply the circumstance of length of time.

“ My lords,—A great deal of reliance has been placed, and ought to be given to the character of the respondent, which is said to be irreproachable, and which has not hitherto in point of fact been impeached. So far as that circumstance goes I am willing to admit it. I find it was considered in the former judgment, and was said by all the judges that he was regarded as a man of character ; but when that character comes to be applied to the present question, the mind of the respondent is an ingredient that seems to run from the beginning to the end of the business. It is said, the situation in which he stood, and the duty he owed to those who had an interest in the sale, put him under no circumstances peculiar or distinct from those which a mere stranger would have stood in, and that he thought himself at liberty to take any species of advantage, and carry them to every extent a stranger might have done ; but, in the construction of law, the very circumstance of being regarded, in that point of view, appears to have misled him to take such advantages, which, even in the case of a stranger, would have been regarded as sharp, and in the case of a common agent, the general principles of law will not allow.

“ My lords,—Another difficulty arose, in which both parties seem to have taken lines so exceedingly opposite, that when one comes to consider the opinion of the judges, it is impossible they should meet in any one point. On the one side, it was supposed the circumstance of being common agent created some legal disability in him to enter into the purchase at all, that therefore it was unlawful, and must be cut down. [\*314] On \*the other side, they seem to imagine, if they could dispose of that, and if they could prove there was no rule of law, which made a contract so entered into unlawful, they had broken up the whole

question made on the other side. In consequence of this, both sides considered, and laboured a great deal to prove whether he was or was not a trustee.

"My lords,—It is undoubtedly clear that no man can be trustee for another, but by contract; but it is equally clear, that under circumstances, a man may be liable to all the consequences in his own person which a trustee would become liable to by contract. But the ground upon which this is rested, is stated in a very few words, and lies in a very small compass. The contract of sale, according to all the forms of it, was a valid and good one, and the estate was by that means vested in Mr. Mackenzie. The York Buildings Company, being the party interested in the subject, without disputing the effect of the law, say, whatever the law may be, yet, from the manner in which this estate was purchased, and under the circumstances of the case, in point of equity, he ought to be compelled to do that which is right upon the subject. In order to affect him with a plea of equity upon this, they state that he was the common agent for the sale of that estate.

"A great deal of argument was used on one side and the other, as to the depositions of the witnesses, and as to the situation he was stated to have filled. But upon the results, if one were to go no farther than the history of the cause, it is exceedingly manifest that the common agent did take upon himself the employment of carrying on the sale to the utmost advantage for the benefit of the creditors, and also for the benefit of a reversion for those who were entitled to it. All the gentlemen seem to admit that this was his duty, and taking it to be so, one side said, that being your situation, it is utterly impossible for you to maintain (perform?) that duty in such a manner as to derive an advantage to yourself. This seems to be a principle so exceedingly plain, that it is in its own nature indisputable, for there can be no confidence placed unless men will do the duty they owe to their constituents, or be considered to be faithfully executing it, if you apply a contrary rule. The common agent, has, in point of fact, gained an \*advantage by it. I take it to be sufficient to support this ground of equity, that he [\*315] had such a duty, and that in the execution of it he did gain an advantage, and that advantage he so gained, was to the prejudice of those in whose behalf he should have been executing his duty. It seems to be enough to prove, in point of conscience, he ought to be compelled to set that matter right.

"Now, my lords, supposing the equity to stand in the way, there is also another principle of equity which seems not to have been taken into consideration by the court, and has not been provided for by any of the decrees in dispute, because it was reversed in the court below. I mean the second interlocutory judgment.

"My lords,—The ground of equity I mean to state was this, that whoever comes into a court of equity to ask for reparation for wrongs done, ought to come prepared to show the justice of his case. For it is impossible that any man can come into a court of equity to rescind a contract, and at the same time desire to retain the price he paid for the contract, or desire to affect any person he has suffered to contract, under

that colour or title ; because, taking these grounds together, they appear to absolve the whole business. Certainly, this question does not depend merely upon the grounds of complaint that were made. I will reduce the complaints made to a very few heads, viz., That, in bringing this estate to sale, he did not bring it under the view of the court or of the public in the best manner, for the purpose of obtaining the real value of the estate. The first article, and that which seems the easiest is, that which they call the grassums. The estates belonged to persons who forfeited them in 1715. They were bought by the York Buildings Company, but were managed in such a manner as to reduce the affairs of the company. They had been so managed, that the old rents of the estate were reserved. Instead of increasing the rents, they thought proper to take their profits by means of grassums, and by this means it was a year's rent upon sixteen years' lease, and half a year's rent on eight years' lease. The consequence therefore was, that the upset price was about two-and-twenty years' purchase, instead of twenty-five. There [\*316] were some articles, timber and other things, \*which are not of great consequence to the decision of the cause. The counsel for the respondent took pains to persuade your lordships he had calculated them in much the same manner in which they had been calculated before, and he insists, if any dilapidation had been suffered, it must have been done accidentally, and he offered to prove that at that time Mr. Mackenzie appeared to have had no intention of purchasing the estate. My answer is, supposing the fact be, that the dilapidation was accidental with respect to the party, the advantage gained by it was not accidental with respect to him. Supposing it to have been made purposely, a common agent being bound to make the utmost of the estate, cannot derive to himself an advantage to the prejudice of his employers, so that objection would not be removed ; but when one comes to observe, on the part of a common agent, who has taken such an advantage as this, as far as this goes, it ought to be carried against the common agent, considering the situation in which he was placed. I know, in some cases, the reports have gone so far as to say, that where distinct evidence was given to prove that a trustee or an executor took an advantage in an article where it would have been impossible to have procured the same advantage for the ward, that even that was set aside ; but I am not prepared to say, that a case might not by possibility exist, where no advantage of that sort had been taken, but I am content to go the whole length my Lord Hardwicke went upon similar occasions, to say you must, in determining upon this, not only consider the points I have mentioned before, but consider the reason which a man in that situation has, not only to commit the fraud, but to conceal it. Therefore, it stands upon no other ground than this, that an advantage has been taken, which the confidence of the agent ought to have prevented ; and it does not appear to stand quite in so fair a light, or to be capable of the alleviation or colour that was attempted to be put upon it on the other side. Perhaps it is true, that four or five or any number of strangers, may combine to bid for the estate by one voice, under an agreement, that if they do not bid against each other, they will divide the profits among themselves ; and



it would be extremely difficult, if not impossible, to find any sort of equity that would overturn \*a public and judicial sale upon that species of transaction; but I take it to be abundantly clear, that [\*317] a common agent (who had made himself, from the duty of his office, perfectly master of the estate) entering into such a bargain as that, must be deemed to have behaved iniquitously. I admit, that according to the fashion of thinking in that country, a common agent is not thought to deal sharply with an estate under such circumstances. Let that stand as an excuse for him, and prevent obloquy; but it is impossible to adopt that in a court of justice. It is not only violating a duty, but it is a corrupt violation of it; for he has kept back purchasers that would have been bidders against him. That was really a violation of his duty, with respect to the two articles that were here bought by him.

"I own, it appears to me, the case has been much too strongly made out against him in that way. It is said, the appellants cannot be suffered, at the distance of eleven years, to plead the incompetency of the respondent. I say, the effect of the distance of eleven years before the suit arose entitled him to no advantage. Where there is a disputable point, a person under such circumstances would be entitled to the advantage of it; but there is no such point here, because all the evidence, both his own, as well as the other, is against him. Much pains were taken to discolour the evidence of Mr. Braidwood, teacher of languages. They said there were some articles in which he was contradicted. That, I confess, raised a doubt concerning his accuracy in point of memory, but there is no difference between his evidence and the rest, because, when he speaks of the conversation with Mr. Mackenzie, there can be no doubt the conversation must have passed exactly in the way he represents it. The counsel for the pursuers endeavoured to prove that Mr. Mackenzie fixed the hour of five for the sale to begin, with a view to prevent him coming earlier. That is overcharged; for the evidence of Braidwood does not go to affect him quite so deeply as that. He says, he inquired of him when it would begin. The judges were perfectly acquainted in point of practice that the sales very seldom begin so early as given out at the bar. That the advertisement was published two days before, but does not point out sufficiently that the sale was to begin with more punctuality than sales \*usually did. Mr. Mackenzie told him it would begin at five o'clock, but he had better go to the office to inquire [\*318] there, where he might look over the papers, and form a judgment at what time it was likely to begin. This was a sort of language which it would have been fair enough to hold. But another thing decisive is his own evidence and that of Mr. Taylor; for when the sale came on he asked Mr. Taylor if Mr. Braidwood was in the room. That strengthens the evidence of Mr. Braidwood a great deal more than all the circumstances together. He asked whether he was in the room, and, upon finding he was not, he went on as stated in the evidence, with such precipitation, that Mr. Taylor remonstrated with him that he was going on too fast, and desired him to call the macer and prevent him from knocking down the bargain so soon. He said, "You may go round and tell him yourself," which was a very awkward circumstance; for while Mr. Taylor was going round to

tell the macer he was acting with precipitation, that lot was knocked down to Mr. Mackenzie, and he chose to take it. His obvious duty was to keep the sale open, and to do for another the very thing he would have done for himself. If he had been selling his own estate, with the expectation of a purchaser's coming, he would have put off, or continued the auction longer. He ought to have done the same thing here that he would have done for himself, and it seems apparent he did not do it.

"My lords,—It is said you shall not quarrel with the rules of the court. The rule is, the proceedings are to be read, and a glass was to run for half an hour. It is clear that these two lots were sold before five o'clock, and consequently there must have been a precipitancy contrary to that which the universal rule of the court held out. It is said you shall not quarrel with the rules of the court. I say so too. If it was in the case of a stranger, he would not be answerable for the court having proceeded in this manner; but an agent cannot take advantage of the court not having proceeded regularly. It seems to be extremely clear, that he has made himself liable to all that which I stated at the outset.

"As to the company having consented, it seems to be a matter of doubt in what manner it was possible for them to proceed in order to obtain [\*319] justice. It is, therefore, not much \*to be wondered at, that the York Buildings Company, when they were deprived of the possession of their own estates, were not able to bring the suit forward, in order to elide the homologation such as will bind the parties. I apprehend it will be sufficient to show, that being apprized it was in their power to set aside the sale, they did some act by which they gave an express preference to the sale standing as it does, instead of seeking to have it rescinded; but there is nothing in the cause from the beginning to the end, that will go to that point. It was argued, and I think pretty strongly, that the forms of the proceedings were not such as enables the pursuer to obtain that justice he is seeking, because anything short of that, not being contained in the summons, ought not to be referred to. I do not at all wonder it was not heard of, because nobody could have attended to the progress of the causes, from that country to this, without observing that correctness in general, with respect to any forms of pleadings, does not make a part of their proceedings; but it is thought if the objection had been made below, in order to listen to an objection in point of form, it would be a sufficient answer. If this sale is to be set aside, the circumstance of its being challenged on certain general terms, will not make the application bad or informal, because the pursuer is desirous to have it set aside without specifying the terms upon which justice will oblige him, the defender, to set it aside. It appears to be necessary that Mr. Mackenzie, having advanced money for the original purchase, and money for improvements, should be reimbursed. It is clear that the lessees, who may have contracted for leases, while the other party suffered his legal title to remain unimpeached, ought not to have their leases challenged, though it might be rather difficult, if this matter was set aside absolutely, to prevent those leases from taking the same consequence. It will be necessary, if the situation of the company requires it, that the sale should be put up again. If it was to be put up again,

it is clear some of these contracts could be preserved no longer. In order, therefore, to preserve all possible claim, it has occurred to me to submit, that the clearest way of doing justice, is that upon which I shall call for the opinion of your lordships.

"I submit that the proper method will be to set aside the \*sale in an equitable point of view, but to do it by compelling a conveyance of the estate, subject to all the terms I have stated. If that should be your lordships' opinion, I propose to reverse the interlocutor, and that the sale complained of should be set aside." [\*320]

Lord Chancellor LOUGHBOROUGH.—"My lords,—I shall submit to your lordships some observations upon the discussion of this case.

"My lords,—I must confess, when the case was opened at your lordships' bar, I felt my mind impressed with several prejudices against the present appeal. The length of time from the sale to the commencement of the present action, had its weight. Another circumstance was, the summons, in the year 1784, was manifestly not proceeded with as any judicial proceeding ought to be; and the enormous length of the arguments stated in the case on the part of the appellants, contributed to raise an idea concurring with the formal judgment of the Court of Session, and the expression of satisfaction they made as to the character of Mr. Mackenzie, and that this was an unfavourable case, stirred up in the hope of gaining an advantage, which if it existed, ought not to weigh at all in accelerating or forwarding the claim of the appellants, namely, the advantage which resulted from the different value of lands in the year 1784, in Scotland, and the value which land bore at the time of the sale.

"My lords,—Notwithstanding all these unfavourable impressions, I felt it my duty to examine particularly into the case, and I see the Court of Session pronounced two judgments opposite to one another, and yet, when I came to examine this case upon principles peculiar to this or that law, it does not depend upon the form in which any rights are disposed of, but upon grounds founded on general principle. I thought neither of the judgments at all applied to the justice of this case. The judgments under which the respondent remained in possession, namely, the first and third interlocutors, were clearly founded on an idea, that the respondent in this cause, in the situation in which he stood, was at liberty to make such a bargain as any stranger or indifferent person might have done \*with respect to the purchase of this estate. The intermediate interlocutor was founded upon an idea, that if anything had not [\*321] been reprehensible in his conduct, yet, being common agent to manage the sale of the estates, he was in a situation in point of law, incapable to become a purchaser, and that the purchase it was impossible to maintain as good, he being common agent. It appeared to me, therefore, that the judges of the Court of Session had been led to adopt two extreme grounds. Those who were of opinion against the respondent entertained this opinion, that, let his conduct be ever so correct, the quality of common agent barred his exercising any right as a purchaser, and that all he contracted for as a purchaser, it was argued at the bar, was a simple nullity, and that it was no good sale. On the other hand, when that had been pressed, those who maintained that such restriction did

not attach upon a common agent, seemed to have thought there was no middle course, and if he was not disabled absolutely in point of law from purchasing, he must stand in the position of all the rest of mankind, and might purchase as advantageously as he could, provided there was no gross practice or direct fraud. Neither of these opinions is at all in my opinion proved. A person who is an agent for another, undertakes a duty in which there is confidence reposed. He undertakes a duty which he is bound to execute to the utmost advantage of the person who employs him. An agent may be employed by any one or more persons, and such an agent may purchase. Brokers purchase every day, but they can take no advantage by it. The bargain must be perfectly fair and equal, at the best price, because they are placed in a situation in which they are bound, in the first instance, to act against their own advantage, and for the advantage of their employers; and if they sacrifice that interest and advantage, with a view of profiting and taking the interest of it to themselves, the purchase will be liable to be set aside, the advantage will not come to themselves, and the breach of confidence will not avail them.

“My lords,—In considering the situation of a common agent, which was the situation in which Mr. Mackenzie stood, I am led to consider what peculiar advantages he had. It had been argued at the bar, that [322] Mr. Mackenzie’s conduct in preparing \*the estates to be put up judicially, was perfectly regular, and according to the course and practice of similar proceedings, namely, judicial sales; but I am apt to think otherwise. The judges have talked of his reputation in the office, and have expressed themselves with regard to his conduct. What is the conclusion? It is, that he acted as common agent, by following the course of the court, by pursuing the methods that had been practised, not deviating from the rule of conduct that all other persons would have observed. If, in consequence of that, a loss had arisen, they could not have charged him with negligence, because he had done that which the court pointed out to be regular in the court. I cannot help observing on the practice which has prevailed, with respect to judicial sales in the Court of Session, for it is manifest that a strict account of the value of these estates is not got in this case. If an estate is let upon the old rents, all the world know the old rents of the estates are not equal to the actual value of the estate. I do not say the rule of the court, in not allowing anything but what is proved to be paid, is a bad rule for fixing the rental; but if you do not set out at fixing the periods at which the rents were fixed, especially when advantage may be got upon the possession, it is clear you leave a great deal of the value behind; and therefore I cannot help saying, if it is the general practice to take no account of the value, it is a very loose practice, and must be attended with great disadvantage to estates disposed of at a judicial sale. How could it then apply? It by no means follows from thence, that there is no proof to be given of what the land in the neighbourhood does yield. It is in itself matter of proof for the court to inquire into. What can the court do? The court will do this,—it is a measure by which the court will go on to tell the world the rent of the estate is more than is actually paid

by the tenant. At any rate, that matter should enter into the inquiry of the court, and they should examine the constituent parts that compose its value. That was not done in this instance, and there are several others which I do not go through. What is the consequence to Mr. Mackenzie, he being the common agent? When the estate came to be put up to auction with such a rental, and such an upset price, Mr. Mackenzie knew the \*actual leases that existed, he knew their [\*323] circumstances, which were but matters of speculation with other persons, but of all those he had an insight. To give your lordships but one instance, I will mention the estate yielding £800 per annum that he bought. The estate had been in the possession of subtenants from the beginning of the century. The rent paid was the only rent stated to be paid by the rental. The leases were all expired. Mr. Mackenzie took grassums according to the rate of one year's purchase, for fifteen or sixteen years' lease, and half a year for seven or eight. What is the consequence of this? Mr. Mackenzie knew perfectly well the actual rent was £800. That the tenants, in fact, paid more, having paid a fine. A fine of one year for fifteen years, is exactly equal to 11 per cent. upon the rent. What was the case of Mr. Mackenzie? He takes it at a good value upon twenty-five years' purchase, upon the rental of £800. But to that you must add £99 more. The consequence of that is, that as for one part of the rent of the estate, Mr. Mackenzie has paid no value at all; and then in their argument they say:—'This is a fair purchase, for I have done what the Court of Session adjudged. I have paid a fair price upon twenty-five years' purchase of £800 per annum.' On the other hand they say:—'You have taken an advantage arising from your knowledge of the subject. You have put money into your pocket by the sale; and you have not paid the price, which, by the tenor of your contract, you ought to have paid.' I think Mr. Mackenzie is bound by duty, and that he could not take that advantage. The Court of Session has considered that he might act as any indifferent person. If he had been any man not engaged in that capacity, and had seen the estate put up, nothing could have been imputed to him. He had a right to avail himself of his judgment and understanding. He, bidding at a public sale, might have got the estate on the best terms he could; but it is not so with respect to Mr. Mackenzie. With respect to the conducting of the sale upon Mr. Taylor's own account, there was hurry and precipitation on the part of Mr. Mackenzie, who should have kept open the sale. It would have been very well if he had been acting for himself, but being in his situation, and knowing there were bidders to come in, he would only have \*done his duty if he had stopped the sale. If an application had been made to the judge, it would have been stopped, [\*324] but it was not stopped, Mr. Mackenzie being the bidder, and present in the court himself. Mr. Taylor tells you he was so concerned he could not sleep all night; for he could see all things had not been rightly done. A common purchaser may snap and take advantage, and if it is not checked at the time, he shall have the advantage of his activity. With respect to Mr. Mackenzie, it is not possible for him to take that which no law would take from a sharp common purchaser. He is the agent, a

man of business, paid for transacting his duty, and, we are to suppose, paid adequate to the performance of it; and it is totally impossible, according to every principle of general policy, and every ground of equity, to permit any advantage to be taken, though he was not the artificer of it, though he did not contrive it for himself, yet he is not to avail himself of that good fortune—it is his duty to prevent it—he is bound to do it,—he is paid to make the most advantage of the sale for the benefit of his employers.

“My lords,—With respect to the acquiescence which has been stated, and which was so much relied upon, I think, if it is fairly stated, it comes to nothing; for it would be a violation of justice to call it so in the circumstances of the case. You cannot impute any laches upon the part of the appellants. Mr. Mackenzie is stated and admitted to be the agent for the York Buildings Company, and for the creditors also; he sold the estate for both; therefore, as long as he continued the agent, as long as the management of the affairs were in his hands, and their funds passing through his hands, and so long as his accounts as agent were unsettled, the company was not in a situation to call him to an account. If a gentleman has a transaction between an agent or steward, and finding himself deceived, continues to employ him for years, then he is not at liberty to call him to an account for his former conduct, but if he dismisses him after coming to a knowledge of his conduct, he may do it. If he is dismissed, and then lies by and suffers time to elapse, then the time will begin to run against him from that period; but never can during the time he was an agent, and the management continued in him. [325] The appellants could not call the respondent to an account. He was not an agent of the election of the York Buildings Company. He was an agent put upon them by the nomination of the Court of Session, and while he continued their agent, no delay can be imputed to them.

“My lords,—Upon these grounds, therefore, I am of opinion that the appellants have established their claim. I am greatly obliged to the noble and learned lord who has digested this case. It would not have been well to have sent this case down again with general directions to proceed on it. The resolutions drawn up are perfectly accurate, and so very distinct and exact, though it is a bold thing to say there will be no farther litigation in consequence of the suit; it has been very much investigated; and I am not without hope it has been of service, as the whole matter will be determined by the present appeal.

“It is ordered and adjudged that the interlocutors complained of in the appeal be reversed: And it is hereby declared, that the decret of sale, and the charter under the great seal, proceeding on the said decree of sale in favour of the defender, with the instrument of sasine in his favour following thereon, ought to be set aside and voided, to such extent and degree, and in manner hereafter provided, and the defender ought to refund to the pursuer all the rents and profits which he hath received out of the estate in question, and an adequate consideration for the enjoyment of such part thereof as he occupied himself; But without

prejudice to the title of the defender to reclaim all such sums of money as he hath paid for the original price thereof, and also for the permanent improvement of the same, with the interest thereof, to be computed from the time when the same were advanced, and paid according to such rates as the Court of Session shall appoint; and likewise without prejudice to the titles and interests of the lessees and others, who may have contracted with the defender *bona fide*, and before the dependence of the present process; and also without prejudice to the title of the common creditors, to have the value of the estates in question, and the amount of the intermediate produce thereof applied in payment of their demands, the expenses incurred by the pursuer in recovering [\*326] \*the same being first deducted. And it is further ordered, that an account be taken of the several sums of money which the defender hath actually paid as the original price of the said estates, and also of such further sums of money as he hath actually laid out for the benefit and improvement of the said estates, and that interest be computed at the above-mentioned rate, upon the said several sums, from the lands, when the same were actually disbursed, and that one of the said accounts be set against the other, and such rests made in taking the same as justice may require; and that either party do pay to the other such sum of money as shall be found due on the balance of the accounts, if nothing be due to the defender, or upon payment of what shall be so found due, that the defender do re-convey the said estates to the pursuers, subject to the demands of their creditors, and to the leases and other contracts as aforesaid, in such manner as the said court shall think fit to direct; and it is also further ordered, that the cause be remitted back to the Court of Session, and that the said court do give all necessary and proper directions for carrying this judgment into execution."

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## II.—TAYLOR v. WATSON.

Jan. 20, 1846.—S. 8 D. 400.

IN 1820, Philip Taylor granted a bond and disposition in security for £600, over certain heritable subjects in Edinburgh belonging to him, in favour of Walter Little Gilmour, Esq.; and, in 1824, he granted a similar security for £1050 over the same, and certain other subjects, in favour of Hugh Watson, W.S. Infettment followed upon both. In 1829, Taylor's estates were sequestrated, and a trustee appointed. In 1830, Watson for himself, and as factor and commissioner for Little Gilmour, twice exposed the subjects to sale, in virtue of the powers of sale contained in the securities, without any offerer appearing. At a third exposure in the same year, Robert Lamb, the trustee in the sequestration, in consequence of a \*previous agreement, with a view to save auction-duty, appeared and minuted that he concurred in [\*327] the sale, and approved of the exposure of the subjects at the upset price of £1700, specified in the articles, and bound himself to subscribe the disposition to the purchaser. The trustee took no further part in the sale, which was entirely managed by Watson, the upset price having

been fixed by him and the articles. The subjects were then sold to James Haig, W.S., who offered the upset price on account of Hugh Watson, who was his partner. The amount of the debts and interest, at the date of the sale, was alleged to be £2283, 14s.

The trustee refused to sign a disposition in Watson's favour, on the ground that he thought the purchase by him illegal, he being the exposor. In consequence of this, Watson, in conjunction with Mr. Little Gilmour, executed a disposition in favour of himself, proceeding on the narrative that the subjects had been purchased at the sale for Watson's behoof, and that he had paid Gilmour the amount of his debt, with interest. Upon this disposition Watson was infest in 1831.

In 1843, Philip Taylor and Hugh Watson being both dead, Daniel Taylor, the heir of the former, brought a reduction of the sale, articles of roup, disposition, &c., against the heir and trustees of the latter, and also against Mr. Little Gilmour. The reasons of reduction were :—*Primo*, The usual one of style. "*Secundo*, The said deceased Hugh Watson having acted for himself, and having also been the private agent both of the said Walter James Little Gilmour, and also of the said deceased Philip Taylor, and having paid up the debt which was due by the said deceased Philip Taylor to the said Walter James Little Gilmour, and having exposed the foresaid subjects to roup and sale on or about the 7th day of July 1830, either in his own name or in the names of the said Walter James Little Gilmour and him jointly; and having himself, at the sale following thereon, purchased the foresaid subjects at the price and value of the sums contained in the foresaid two bonds and dispositions in security, amounting together to the sum of £1650 sterling, while these subjects were worth at least the sum of £3500 sterling, he, the said deceased Hugh Watson, acted illegally. *Tertio*, The said [328] deceased Hugh Watson, having, \*during his life, and the defender, the said Hugh Watson, as his heir-of-line, or the defenders, the said James Haig, Adam Hay, and Robert Pringle, as his trustees, having, since his decease, drawn the whole of the rents of the foresaid subjects, they in so doing also acted illegally. *Quarto*, The holder of a bond and disposition in security, with power to sell, is in a situation analogous to that of a trustee. In the exercise of the power committed to him, he acts, not for his own benefit only, but for behoof of all concerned, of the other creditors, where there are any, and of the debtor himself, who has the resulting interest; and if he is thus a trustee, or in a situation analogous to it, he cannot legally purchase the property over which he has the power of sale. *Quinto*, Where the buyer and seller are one and the same, in opposition to the maxim *alius emptor alius venditor*, the transaction, whatever it may be called, is not a sale, and cannot be the foundation of a title where a *bona fide* sale is required, both by compact and statute, to give a valid disposition: And *sexto*, The great discrepancy betwixt the true value of the foresaid property, and the nominal price at which it was bought in by the exposor, shows that the purchaser took a gross advantage of the party from whom he held his heritable security, while that party was his own client; and the said defenders, their predecessors, and authors, have no good right



to the said subjects, or title to possess the same, and they belong to the pursuer, as heir-apparent aforesaid." There were also conclusions for removing, and count and reckoning.

Before defences were given in, Robert Bloomfield, who had succeeded Lamb as trustee in Taylor's sequestration, sisted himself as a joint-pursuer.

The defenders stated that they were willing to abandon the sale, and account for their intromissions with the subjects upon receiving payment of their debts, with the accruing interest. They pleaded, 1. The sale having been made by two heritable creditors, under the powers of sale contained in their bonds, with the concurrence of the trustee in the sequestration, and after every fair effort to get the property disposed of, there exist no legal grounds on which the purchase of the subjects by one of these heritable creditors can be challenged; more [\*329] \*especially as there is no pretext or allegation of any unfairness in the procedure. 2. The amount of the heritable debts having greatly exceeded the value of the subjects at the time of the sale, and the subjects having been sold at their full price, all pretence of actual loss or damage is excluded. The offer of the defenders to surrender the purchase on payment of the debts over the property, with interest and reimbursements of outlay, excludes all pretext of injury.

The lord ordinary pronounced the following interlocutor:—"Finds the following facts instructed or not explicitly denied on record: 1mo, That the properties libelled on were exposed to sale in 1830, by the deceased, Mr. Hugh Watson, W.S., the predecessor of the defenders, in virtue of the powers contained in two bonds and dispositions in security, one whereof, for £600, had been granted in 1820, by the pursuer's father, Philip Taylor, in favour of Walter Little Gilmour, Esq., of Craigmillar, for whom Mr. Watson was factor and commissioner; and the other, for £1050, had been granted by the pursuer's father in 1824, to the said Hugh Watson himself: 2do, That the estate of the said Philip Taylor, the granter of the said bonds, was sequestrated in 1829, but the trustee on the sequestrated estate did not take any measures to sell the property over which the said bonds extended, but consented to the said subjects being exposed to roup by Mr. Watson in 1830: 3tio, That it does not appear that the trustee, or the agent in the sequestration, took any charge whatever of the sale, but, on the contrary, that the sales were entirely conducted by the said Hugh Watson: 4to, That the said subjects libelled on were purchased at the third exposure, in October, 1830, by the said Hugh Watson, acting for his own behoof; and he afterwards, with consent of Mr. Little Gilmour, in 1831, granted the disposition in favour of himself, which is one of the leading documents under reduction: 5to, That the trustee refused to subscribe the disposition, as being doubtful how far the sale by Mr. Watson to himself was proper and valid in law. Upon the state of the facts as thus ascertained, finds, in point of law, that the said purchase at a roup of subjects exposed as aforesaid, either by the creditor who has exposed them, or by his agent, more \*especially *sine auctoritate prætoris*, was not proper or valid in law, and ought to be set aside: Therefore decerns and declares [\*330]

in terms of the reductive conclusions of the libel. But before answer as to the conclusions for removal, and for accounting as to bygone profits, rents, and ameliorations, appoints the defender to lodge in process an account or accounts thereof, with the vouchers, so far as he is possessed of any, on or before the first box-day, and remits the same, when lodged, to Mr. James Donaldson, accountant, to hear the parties thereon, and to call for additional vouchers, if he see cause, and to make up a state of the balance between the defender and pursuer as at Martinmas next, holding them still to stand in the relation to each other of creditor in possession, and debtor; reserving, in the meantime, all questions of expenses."

In a note, the lord ordinary observed,—“There is no rule of equity more generally and rigidly enforced, or more salutary in itself, than that which annuls a sale when the purchase was made at a public roup by the creditor exposer, or his agent. Sir Edward Sugden, in his *Treatise on Sale*, vol. iii. p. 225, says, that ‘It may be laid down as a general proposition, that trustees, unless they are nominally such, as trustees to preserve contingent remainders, agents, commissioners of bankrupts, assignees of bankrupts, solicitors to the commission, auctioneers, creditors who have been consulted as to the mode of sale, or any persons who, by being employed or concerned in the affairs of another, have acquired a knowledge of his property, are incapable of purchasing such property themselves, except under the restrictions which will shortly be mentioned. For, if persons having a confidential character were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information, and not to exercise it for the benefit of the persons relying on their integrity. The characters are inconsistent. *Emptor emit quàm minime potest, venditor vendit quàm maxime potest.*’

“In a subsequent section, (§ 4, p. 228,) the author adds,—‘Where a mortgagee sells under the general order in bankruptcy, it is usual to apply for leave for him to bid at the sale where he intends to do so. But [\*331] there he may be fairly considered as the \*seller, and he cannot, without the leave of the court, sustain the two characters of seller and buyer. But if a mortgagee take a conveyance with a power of sale, he is a trustee for sale, and as such disabled from purchasing.’

“These rules are as clearly recognized in our own law as in that of England. Indeed, it deserves particular remark, that the leading authority cited by the learned author for the propositions now quoted, is the doctrine of the house of lords in the well-known case from our own court of the *York Buildings Company v. Mackenzie*, which has been followed by a train of determinations to the same effect in England, thus showing that the law of the two countries on this point is the same. Since that case occurred, few similar questions have been tried in Scotland; but reference may be made to the case of *Jeffrey*, 16th June, 1826, where the general doctrine was again confirmed.

“The only case that affords an apparent support to the defender’s argument, is that of *Drummond v. Maxwell*, where the trustees of a creditor holding a disposition in security for a debt, brought the sub-

jects to sale under authority of the sheriff, and became purchasers of the subjects themselves. Having charged the debtor to grant a disposition under this sale, he presented a suspension; but as the creditor offered instantly to surrender his purchase on being paid his debt and interest, the court found that the debtor must either accept that offer, or confirm a sale made by judicial authority. See 2 Shaw, 21st January, 1823; and 4 Shaw, 2d July, 1825. It is supposed that that case was held to fall substantially within one of the exceptions stated by Sir Edward Sugden, and that the creditor was held to have made the purchase by public notice, and under the sanction of the judge ordinary."

The Defenders reclaimed.

LORD PRESIDENT.—The facts stated in the interlocutor of the lord ordinary are correct in point of fact, except in so far as it is therein stated that the deceased Mr. Watson was himself the purchaser of the subjects here in question, whereas it was Mr. Haig, his partner, who appeared at the sale, and offered \*for the property, and that it [\*332] was to him that the property was adjudged. It appears, however, that Mr. Haig so appeared and offered at the sale on account of his partner, Mr. Watson. And this is manifest from the fact, that the trustee on Taylor's bankrupt estate refused to give his concurrence to the disposition to Mr. Watson, on the ground that the purchase by him was irregular, and that the disposition itself was granted by Mr. Watson, as seller, in favour of himself (Watson) as purchaser. In these circumstances, and seeing that the whole matter of the sale, and everything connected with it, was managed, not by the trustee, but by Mr. Watson himself; that nothing was done by the trustee in conjunction with his statutory coadjutors, the commissioners, to fix the upset price, or take any of the other steps towards a sale; that Mr. Watson himself, from first to last, took the management of the whole affair; that the articles of roup were framed by him, and all bear to be written by his own clerk; that he fixed the upset price of the subjects before each of the three separate sales; I think it clear that he is answerable for the whole of them; that he was out and out the exposor of the subjects to sale; that he was the person who alone fixed the upset price, and managed the whole transaction. It is out of the question to attempt to assimilate the sale which took place in consequence of those measures, to a sale of subjects burdened with an heritable debt made by the trustee in a debtor's sequestration, and the purchase of such subjects by the heritable creditor. When that case is presented to us, it will be dealt with according to the rules of law. In the meantime, I do not feel it necessary to give any judgment upon it. The case now before us is quite different. Watson, the heritable creditor, was himself the person who exposed the subjects for sale, and he became the purchaser. After the second adjournment, it appears, indeed, that Mr. Lamb, the trustee upon Taylor's sequestrated estate, appeared before the judge of the roup, and, as the minutes of sale bear, "declared that he, as trustee foresaid, concurred in the sale of the whole subjects within described, upon the conditions specified in the foregoing articles and minutes of exposure," &c. All that appears as to the trustee's connexion with the sale is contained in this minute, which, like all

[\*333] the \*other writings connected with the matter, is written by Mr. Watson's clerk. It will be observed, that this consent comes very late in the proceedings. All the preliminary steps had been taken by Watson. Mr. Lamb, however, engaged to concur in completing the purchaser's disposition to the property, as appears from the minute which I have already noticed; and his reason for doing so is shown by his agent's letter, viz., that he should get one-half of the saving of auction duty.

But, then, did Mr. Lamb, when he gave this qualified concurrence to the sale, ever conceive that Watson himself was to be the purchaser? There is no reason whatever to suppose so; for we see from the correspondence, that whenever it appeared that Watson was really the purchaser, Mr. Lamb immediately said "No; the transaction was an irregular transaction, with which I cannot connect myself." Upon the trustee's refusal to concur in the disposition, Mr. Watson immediately executes a disposition in his own favour. Under these circumstances, the question is, is this a sale which can be sanctioned? The law on this subject is placed beyond the possibility of doubt or question by the decision in the case of Mackenzie, the principle of which has been confirmed by subsequent decisions; and that principle is not to be infringed on narrow grounds. So satisfactory and unimpeachable has the judgment of the house of lords in that case been considered, that Sir Edward Sugden, in his *Treatise on Sale*, makes the decision in the case of Mackenzie the basis of that passage stating the law on the present subject which is quoted in the lord ordinary's note. The rule established, in short, may be stated to be this, that where a party is possessed, from his relation to the subject, with peculiar means of knowledge, and is the framer of the conditions of the sale of such subject, he cannot be the purchaser of it. The rule itself is surely a most salutary one. I would not wish to be supposed to cast any imputation whatever on Mr. Watson, who is dead and gone. I daresay he acted in all good faith. At the same time, it is easy to fancy cases where a debtor, who has been by his necessities forced to grant a bond over his heritable property, might, if such sales as the present were countenanced, be compromised by the party holding [\*334] such bond with a power of sale, who might so arrange \*as to render the form of a sale the means to transfer the whole of the debtor's property to himself.

As to any plea of hardship—that cannot be heard. Look at the case of Mackenzie. That gentleman was held free from all imputation of improper or unfair conduct. His purchase of the property was an act fortified by continued practice; the action of reduction of the sale was not brought for eleven years after the sale; and the Court of Session, in the circumstances, would not reduce it. But the house of lords reversed their judgment, and held that the sale could not be sustained.

The case of *Beveridge v. Wilson* has been alluded to. In that case, the trustee would not interfere in the disposal of the property at all. The heritable creditor himself took steps to bring it to sale. The trustee then interfered, by suspension, to prevent the steps taken for bringing the property to a sale, and there the court very judiciously refused the

suspension. In that case, however, in which the opinion of the whole court was taken, the opinions of the consulted judges contained an expression of opinion that, to a certain extent and effect, the heritable creditor in such a sale is to be considered as a trustee for all parties interested in the property, and that he must account to the last farthing for the proceeds of the sale. But this trusteeship, recognized as existing in the heritable creditor, is a material ingredient in that disqualification, attaching to his power of purchase of the subject over which his security extends.

The concurrence of the trustee in the sequestration in the sale of the subjects here in question was a mere sham. It was apparently a device to save auction-duty. We know not how he and Mr. Watson settled their accounts; but if the matter had come before the judges in her Majesty's Court of Exchequer, I am sure they would have held it their duty to have sifted that matter to the bottom. That, however, is no concern of ours.

On the whole, I am clearly of opinion that the interlocutor of the lord ordinary must be adhered to.

LORD MACKENZIE.—I hold it a general rule of law, that a creditor, having an heritable bond, with a power of sale cannot \*sell to himself. He is the mandatory of the debtor in the sale of the [\*335] land, and as such bound in duty to sell fairly, and with due diligence, to get a good price for the benefit of the debtor. He has power to pay his debt out of the price, but first he has a mandate to sell as for the owner. He cannot make himself the buyer without creating an interest adverse to that duty, *i. e.*, an interest to sell as cheap as possible. That is the very ratio of the house of lords in the case of Mackenzie. And it applies *a fortiori*, for a creditor of this sort has much more in his power than a common agent in a judicial sale.

It may be that a creditor holding such power may apply to this court, or to the sheriff, to grant authority for appointing a judicial manager of this sale, and that then he may be a buyer at that sale. But nothing of that sort was attempted here.

The principle is also confirmed by the case referred to by your lordship, and that rule seems applicable in the present case. For here the bond was of that nature, and the sale was in terms of it by the creditor, who was also the buyer himself. He bought by the instrumentality of Haig, but that makes no difference.

Nor do I see any special circumstance to take this case out of the rule. It may be that a debtor may, by express words, authorize his creditor, not only to sell his land, but also to buy it when so sold, though that is not, I think, at all a clear point, I certainly doubt whether it would not be held an illicit extortion, of the nature of an excessive penalty for non-payment of debt, which could not be enforced in law. But it is enough to say there was no such authority granted in this case.

It is said that in this case the debtor was bankrupt, and that his trustee consented to the purchase by the creditor. But (1.) The trustee had no power to consent to any such thing; and (2.) He never did consent to

any such thing, but, on the contrary, as soon as he found out that the creditor had purchased, he challenged it.

It is said he knew, and approved of, the sale by the creditor, and of the upset price. But it is one thing to consent to a sale by a certain [\*336] person and an upset price, and another thing to \*consent to that person being purchaser at that sale, as well as seller. A person, whose estate is sold by another person, has a right, not only to the security of an upset price, but to that resulting from the due execution of the duty of the mandatory, trustee, or agent in the sale. There was, I presume, an upset price in Mackenzie's case, approved by the trustee and by the court too. But that was not held enough.

Lastly, it is said the sale was in fact a judicial sale by the trustee. But, on the contrary, that is precisely what Mr. Watson would not allow it to be, insisting on selling the land himself, and obtaining the consent of the trustee to this sale by himself, apparently to found a pretence for non-payment of stamp-duty. It is out and out a sale by the creditor, though the trustee allows him to sell it. I see nothing, therefore, to take the case out of the general rule; and, therefore, though I really believe the intentions of Mr. Watson were quite honest, yet I must adhere to the lord ordinary's interlocutor.

Lord FULLERTON.—The result of consideration has been to remove the doubt I formerly entertained, and to induce me to concur in your lordship's opinion, that the interlocutor should be adhered to. I must throw out of view the effects of the supposed concurrence of the trustee here. The proceedings took place under the former Bankrupt Act, in which no power is given to a trustee to concur in a sale by an heritable creditor. On looking to the clause of the act, and the authority, it is clear that all the requisites of the statute for a sale under his authority were neglected. A supposed concurrence by him in a sale by a creditor, for which there is no provision in the act, without any of the statutory proceedings which are necessary, in order to enable him to sell himself, must be thrown out of consideration. The only question then is, whether an heritable creditor, exposing lands to sale under a power of sale, is entitled to become a bidder. If this question had been open, I should have entertained great doubts indeed in holding that a creditor was in the position of a trustee or agent. But I must now hold that point to have been settled by authorities both here and in England, which rest on considerations of [\*337] expediency as forcible here. The case of Jeffrey, June 16, 1826, \*4 S. 722, carries the principle very far indeed. In the case of Drummond, June 21, 1823, 2 S. 130, the whole proceeding was conducted under the authority of the court, and must have been held a sale by the court. The case of Jeffrey was an extreme case, imposing great hardship. In that case there was a bidder different from the heritable creditor, and it was only to prevent the lands going at the lower price he offered, which they must have done, that the creditor offered more. There was no imputation of any unfair dealing, and the court must have gone on the principle, that a creditor cannot be the purchaser at a sale under his own power.

Lord JEFFREY.—I concur. The principle involved in this case is a

very familiar and general one in our law—that no person can be *actor in rem suam*. The stringency of the maxim has been ruled and held settled by the house of lords in the case of Mackenzie. One of the great principles settled in that case was, that an allegation of improper conduct in such a case was wholly irrelevant, the principle being so strong that a creditor cannot be both buyer and seller. In judicial sales, the fact that the whole proceeding is public from the beginning—the upset price fixed, and the articles prepared by the court, and not by the party—makes a distinction. The upset price is fixed upon a proof. I hold it now to be peremptorily fixed,—and in a case, as Lord Fullerton has observed, of great hardship, and so fixed that the court should not be tempted by considerations of equity to unsettle it—that a creditor cannot become the purchaser at a sale by himself. It is now *presumptio juris et de jure*, that where a person stands in these inconsistent relations of both buyer and seller, there are dangers; and it is not relevant to say, that it is impossible there could be any in the particular case. I should be sorry to think that any doubt was thrown on this rigorous principle, which has been established both here and in the other end of the island.

The court accordingly adhered, with expenses since the date of the interlocutor.

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\*1. In the case of the Aberdeen Railway Company v. Blaikie, 20th July, [\*338] 1854, 1 M'Queen's Reports, p. 461, the house of lords, reversing the judgment of the court below, held that a contract entered into by a manufacturer for the supply of iron furnishings to a railway company, of which he was a director, or the chairman at the date of the contract, was invalid, and not enforceable against the company. Lord CRANWORTH, chancellor, observed, "This, therefore, brings us to the general question—whether a director of a railway company is or is not precluded from dealing on behalf of the company with himself, or with a firm in which he is a partner? The directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can only act by agents; and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such an agent has duties to discharge of a fiduciary character towards his principal. And it is a rule of universal application, that no one having such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest, conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is, or may be impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the *cestui que trust*, which it was possible to obtain. It may sometimes happen that the terms on which a trustee has dealt, or attempted to deal with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person—they may even at the time have been better. But still, so inflexible is the rule that no inquiry on that subject is permitted. The English authorities on this subject are numerous and uniform. The principle was acted on by Lord King in *Keech v. Sandford*, Cas. Temp. King, 61, and by Lord Hardwicke in *Whelpdale v. Cookson*, 1 Ves. Senr. 9; and the whole subject was considered by Lord Eldon on a great variety of occasions. It is sufficient to refer to what fell from that very able and learned judge in *Ex parte James*, 8 Ves. 348. It is true that the questions have generally arisen on agreements for purchases or leases of land, and

not, as here, on a contract of a mercantile character. But this can make no difference in principle. The inability to contract depends not on the subject-matter of the agreement, but on the fiduciary character of the contracting party; and I cannot entertain a doubt of its being applicable to the case of a party who is acting as manager of a mercantile or trading business for the benefit of others, no less than to that of an agent or trustee employed in selling land. Was, then, Mr [339] \*Blaikie so acting in the case now before us? If he was, did he, while so acting, contract on behalf of those for whom he was acting, with himself? Both these questions must obviously be answered in the affirmative. Mr. Blaikie was not only a director, but, if that was necessary, the chairman of the directors. In that character, it was his bounden duty to make the best bargains he could for the benefit of the company. While he filled that character, viz., on the 6th February, 1846, he entered into a contract on behalf of the company with his own firm, for the purchase of a large quantity of chairs at a stipulated price. His duty to the company imposed on him the obligation of obtaining these iron chairs at the lowest possible price. His personal interest would lead him in an entirely opposite direction—would induce him to fix the price as high as possible. This is the very evil against which the rule in question is directed; and I see nothing whatever to prevent its application here. I observe that Lord Fullerton seemed to doubt whether the rule would apply where the party whose act or contract is called in question, is only one of a body of directors, not a sole trustee or manager. But, with all deference, this appears to me to make no difference. It was Mr. Blaikie's duty to give to his co-directors, and through them to the company, the full benefit of all the knowledge and skill which he could bring to bear on the subject. He was bound to assist them in getting the articles contracted for at the cheapest possible rate. As far as related to the advice he should give them, he put his interest in conflict with his duty. And whether he was the sole director, or only one of many, can make no difference in principle. The same observation applies to the fact that he was not the sole person contracting with the company. He was one of the firm of Blaikie Brothers, with whom the contract was made, and so interested in driving as hard a bargain with the company as he could induce them to make. It cannot be contended that the rule to which I have referred is one confined to the English law, and that it does not apply to Scotland. It so happens that one of the leading authorities on the subject is a decision of this house on an appeal from Scotland. I refer to the case of the York Buildings Company v. Mackenzie, 8 Brown's Parl. C. 42, decided by your lordships in 1795. There the respondent Mackenzie, while he filled the office of common agent in the sale of the estates of the appellants, who had become insolvent, purchased a portion of them at a judicial auction, and though he had remained in possession for about eleven years after the purchase, and had entirely freed himself from all imputation of fraud, yet this house held that, filling as he did, an office which made it his duty both to the insolvents and their creditors to obtain the highest price, he could not put [340] himself in the position of purchaser, and so make it his interest that the price paid should be as low as possible. This was a very strong case, because there had been acquiescence for about eleven years. The charges of fraud were not supported, and the purchase was made at a sale by auction. Lord Eldon and Sir W. Grant were counsel for the respondent, and no doubt everything was urged which their learning and experience could suggest in favour of the respondent. But this house considered the general principle one of such importance and of such universal application, that they reversed the decree of the Court of Session and set aside the sale. The principle, it may be added, is found in, if not adopted from the civil law. In the Digest is the following passage:—'*Tutor rem pupilli emere non potest; idemque porrigendum est ad similia, id est, ad curatores, procuratores, et qui negotia aliena gerunt.*' In truth, the doctrine rests on such obvious principles of good sense, that it is difficult to suppose that there can be any system of law in which it would not be found. It was argued that here the contract ultimately acted on was not entered into while Mr. Blaikie was director; for that, though a contract had been entered into in February, yet that contract was afterwards abandoned, and new terms agreed on in the following month of June. This, however, is not a true repre-



sentation of the facts. The contract of February was, it is true, afterwards modified by arrangement between the parties, but this cannot vary the case. If, indeed, the contracting parties had in June unconditionally put an end to the original contract, so as to release each other from all obligation, the one to purchase and the other to sell at a stipulated price, the case would have assumed a different aspect. But this was not done. The contract of price was not a contract entered into between parties on the footing of there being no obligation then binding on them, but an agreement to substitute one contract for another supposed to be binding. Messrs. Blaikie did not say to the directors in June—We have no binding contract with you, but we are now willing to contract. What they said amounted in fact to this:—We have a contract which was entered into in February, but we are ready, if you desire to modify it. To hold that this, in any manner, cured the invalidity of the original contract, would be to open a wide door for enabling all persons to make the rule in question of no force. It was further contended, that whatever may be the general principle applicable to questions of this nature, the legislature has, in cases of corporate bodies like this company, modified the rule. The statute—that is, the Companies Clauses Act,—it was argued, has impliedly if not expressly recognised the validity of the contract by enacting, that its effect shall be to remove the director from his office,—indicating thereby that a binding obligation would have been created, which \*would render the longer tenure of the office of director inexpedient. And your lordships were referred to a case, *Foster v. The [341] Oxford, Worcester, and Wolverhampton Railway Company*, 13 C. B. 200. That was an action for breach of a contract under seal, whereby the defendants covenanted with the plaintiffs (as in the case now before your lordships) to purchase from them a quantity of iron. The defendants pleaded that at the time of the contract one of the plaintiffs was a director of their company. And to this plea there was a general demurrer. That such a contract would in this country be good at common law is certain. The rule which we have been discussing is a mere equitable rule, and therefore all that the Court of Common Pleas had to consider was, how far the contract was affected by the statute. The decision was, that the statute left the contract untouched, and that its operation was only to remove the director from his office. The 85th and 86th sections of the English statute 8 and 9 Vict. c. 16, on which the court proceeded, were in the same words as the 88th and 89th sections of the Scotch Statute, and the counsel at your lordships' bar relied on this decision as being strictly applicable to the case now under appeal. But there is a clear distinction between them. In Scotland there is no technical division of law and equity. The whole question, equitable as well as legal, was before the Court of Session. All which the court of Common Pleas decided was, that a contract clearly good at law was not made void by an enactment that its effect should be to deprive one of the contracting parties of an office. That decision will not help the respondents, unless they can go further and show that the statute had the effect of making valid a contract which is bad on general principles enforceable here only in equity, and not recognized in our courts of common law. I can discover no ground whatever for attributing to the statute any such effect. Its provisions will still be applicable to the case of directors who become interested in contracts as representatives or otherwise, and not by virtue of contracts made by themselves. I have therefore satisfied myself that the Court of Session came to a wrong conclusion, and that the defender's third plea was a sufficient answer to the pursuer's case, and so that the appellants ought to have been assolized. I therefore move your lordships that this interlocutor should be reversed."

2. In the same case, Lord BROUGHAM observed,—“I also arrive at exactly the same conclusion as my noble and learned friend, that the law of Scotland differs in no respect from the law of England upon this matter; and it is very important that it should be understood that there is no such difference between the two systems of jurisprudence. The cases which have been referred to of *Whelpdale v. Cookson*, 1 Ves. Senr. 9, and chiefly the case of *Ex parte James*, in bankruptcy, clearly lay \*down what the law of England upon this point is. And [342] Lord Eldon, either in that case, or in one of the others, in *Campbell v. Walker*, or in *Ex parte Lacey*, goes even further than Lord Hardwicke did in

Whelpdale v. Cookson, and considers (though he expresses it, no doubt, with the respect due to that eminent judge, rather as a grave doubt than as a well matured opinion) that Lord Hardwicke, did not go far enough in giving effect to this principle when he said, that it was possible that the assent of the creditor might validate the sale. Now, how far the two systems of law are the same upon this very important question appears not only from that which my noble and learned friend has adverted to, namely, the case of *The York Buildings Company v. Mackenzie*, which is the ruling case upon this subject, and which was decided upon an appeal from Scotland, and according to the principle of Scotch law, in this house, but it also appears from the fact that in that case a distinct reference was made, at least in the argument at the bar, to the English law authorities, and to the very case of *Whelpdale v. Cookson*. The case of *Ex parte James* could not have been referred to, because it was decided some years afterwards, but the case of *Whelpdale v. Cookson* is referred to in the argument at the Scotch bar, as well as the passage in the *Digest* from the Roman law which my noble and learned friend has read. It is also to be observed, that not only were the English cases cited in Scotland in that instance, but conversely the Scotch case of *Mackenzie v. The York Buildings Company* is referred to afterwards in the English cases repeatedly at the bar, and once or twice, I think, by Lord Eldon himself in disposing of English cases. My lords, the case of *Mackenzie* was, as my noble and learned friend has observed, after eleven years of possession, and it is remarkable, too, that there was no fraud whatever found imputable to the party—Mr. Mackenzie the purchaser—in that case. I think that in the account of the subsequent proceedings in the case, though not in the court below, it appears that so entirely *bona fide* was Mr. Mackenzie's possession found to be, that the rule of the civil law, happily the rule in Scotland, though most unfortunately never introduced into our jurisprudence, namely, that '*fruges bona fide perceptæ et consumptæ*' are to be held to be the property of the party who is ultimately held not to have the title, was applied in the case of *Mackenzie*. So entirely free from all imputation of fraud was he found to be, that he was allowed not merely to remain in undisputed and undisturbed possession of the rents and profits of the estate during these eleven years, that is up to the period of the appeal, because the rule of *bona fide* consumption applies not only up to the time of a decision against him in the court below, but up to the final decision of the Court of Appeal. And accordingly Mr. [343] \*Mackenzie's *bona fides* was found to be so unimpeachable in the case, and his conduct in the whole transaction was found to be so entirely without fraud, that not only did the court below find the other party liable to costs because they had charged him with fraud, which the court at first decided in his favour, but afterwards he was adjudged to have the whole of the expenses allowed to him to which he had been put in ornamental improvements upon the estate. That is certainly one very strong instance of the application of the rule; perhaps it is stronger than any other within our recollection, because in that case it clearly shows that so entirely was the opinion of the court in favour of the rule, that even while they held that the transaction could not be sustained, but that his purchase was invalid, they nevertheless decreed him possession of the rents and profits, and also to be allowed for the expenses of improvements. In that case, my lords, I must also observe, that it was not merely the decision of this house which set the court below right upon a point of Scotch law, as it has once and again done; but the Scotch law appears to have been by no means distinctly maintained by the court below to be, as it was ultimately found not to be by your lordships' decision, for, in the first instance, they decided against the party, and repelled the reasons for reduction. It was an action of reduction for setting aside the sale, and they repelled the reasons for reduction. On the reclaiming petition the court, by a narrow majority, sustained the reasons for reduction, and set aside the sale. Then again came both parties to appeal against this second decision; and then by a narrow majority, again the court assoilzied the defender, and found, as I have already stated, that in respect of the charge of fraud, the defender Mr. Mackenzie was entitled to his expenses. Therefore it cannot be said to have been at all the understanding of the Court of Session that the law was in favour of such purchases at the time, when you find

these two conflicting decisions in the court below, and each by such a very narrow majority. At that time, unfortunately, the course of reporting in Scotland was that the judges' opinions were not given; and it is only accidentally and rarely that you find any reference made to what passed upon the occasion; but in this case it is stated in the report that several of the judges exercised a strong opinion against the validity of the purchase; and the reasons are given, and the very ground which had been urged for sustaining the purchase and the validity of the transaction, namely, that in judicial sales it had been a very common practice for the common agents to become the purchasers; and that though, in 18 out of 135 instances, they became the purchasers, yet no instance had been found of an attempt made, or certainly of an attempt succeeding to set aside such a purchase, (but the report would rather go the length of stating that no instance had \*been found of an attempt made to set aside any such purchase)—the learned judges, I say, who held that such transactions were [ \*344 ] illegal, were of opinion that it was a ground which afforded all the stronger reason for the court laying down what the law of honesty and what the law of common sense was, in disapproving of any such transaction. My lords, I also agree with my noble and learned friend, that the decision in the case of *Foster v. The Wolverhampton Company*, in the Common Pleas, upon which great reliance was placed at your lordships' bar, does not apply to this case, because there the transaction was, past all doubt, valid at common law, though not in equity; but had the Court of Common Pleas had an equitable jurisdiction, as well as a common law jurisdiction, the anomaly never could have happened of a transaction being found legal and valid in that court which could not stand an examination on the other side of Westminster Hall. It has not often occurred to me to see a stronger instance of the great inconvenience, to say the very least of it, of that division between the two sides of Westminster Hall—I will not say that impassable barrier between them; for, on the contrary, it is constantly, and must be, for the sake of justice, constantly passed; but I have seldom seen a more striking instance of the inconvenience of the existence of that division, and of not allowing the court to exercise both jurisdictions; at all events, whenever a case arises in which entire justice cannot be done without the exercise of both jurisdictions. My lords, upon the whole, I entirely agree with my noble and learned friend, that there has been here a miscarriage in the court below, and that the interlocutor in this case should be reversed."

3. In a note to the above case, the reporter observes,—“The case of the *York Buildings Company v. Mackenzie*, so far as its legal principle is concerned, is better known and more attended to in England than in Scotland. The argument at the bar of the house of lords, during two sessions of parliament, 1794 and 1795, lasted sixteen days; judgment was given on the seventeenth. Lord Loughborough was, indeed, chancellor then; but the tradition (there is no report) is, that Lord Thurlow, who had decided, *Fox v. Mackreth*, very shortly before, took the chief part in the hearing and deliberation. He is recorded in the journals of the house as present every day. The judgment pronounced is not a mere reversal, but is followed by elaborate prospective and retrospective directions, drawn up after the fashion of a chancery decree. Lord Eldon and Sir W. Grant, 3 bis, 746, designate it as the *great case*, and refer to it repeatedly. Messrs. White and Tudor cite it in their *Leading Equity Cases*, vol. i. pp. 72, 109; but Mr. Ross omits it in his similar work on Scotch law, a circumstance which is mentioned not as impeaching that most useful collection, but simply as showing \*that this case, which has always been regarded as a ruling [ \*345 ] authority in England, is comparatively forgotten in the country from whence it came."

4. The statements in this note require to be corrected. 1. The case is reported at great length in Mr. Paton's very valuable "*Reports of Cases in the House of Lords*," with the speeches of both Lord Loughborough and Lord Thurlow. 2. The collection of cases in the law of Scotland referred to in the note is not similar to that by Messrs. White and Tudor, of equity cases in the law of England, the former not being a general collection of cases in the law, but a special collection of cases systematically arranged in a particular department of the law. The case of *Mackenzie* was therefore not accidentally omitted, but designedly ex-

cluded, as not falling under any of the heads of law illustrated in that collection. 3. The further statement in the note that the legal principle involved in the case is better known and more attended to in England than in Scotland, is negatived by a reference to the case of *Taylor v. Watson*, also given in the text, the judgment in which depended exclusively on the principle established in the case of *Mackenzie*, and, indeed, was an extended application of the principle. The speeches of the judges in the case of *Taylor v. Watson*, refer both to the case of *Mackenzie*, and also to the work of Lord St. Leonards on vendors and purchasers, as showing the authority of that case in the law of England. The principle of the case of *Mackenzie* also ruled the case of *Jeffrey v. Aitken*, decided June 16, 1826, where it was held that a purchase by an heritable creditor, at a public sale made by him under a power of sale contained in his bond, was illegal. In that case the lord ordinary observed, "So far as the lord ordinary can see, it is impossible to hold that the seller can also be the buyer of a subject, after the judgment of the house of lords in the case of the *York Buildings Company v. Mackenzie*, 13th May, 1795, and he cannot help considering the case of such sales as the present as affording much stronger grounds for a reduction than a sale carried on under the sanction and superintendence of a court. That there has been acquiescence for twelve years seems not sufficient to exclude the right of reduction. In *Mackenzie's* case the reduction was not raised till 1790, and the sale had been in 1779; and a practice of common agents offering at such sales, and in some instances becoming purchasers was disregarded."

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[\*346] \*A FACTOR HAS A GENERAL LIEN UPON THE GOODS OF HIS PRINCIPAL IN HIS POSSESSION, AND UPON THE PRICE OF SUCH AS HAVE BEEN LAWFULLY SOLD BY HIM, OR UPON THE SECURITIES GIVEN UPON THEM, AS WELL FOR THE GENERAL BALANCE OF THE FACTORIAL ACCOUNTS BETWEEN HIM AND HIS PRINCIPAL AS FOR THE CHARGES AND DISBURSEMENTS ARISING UPON SUCH GOODS, BUT HIS RIGHT OF LIEN DOES NOT EXTEND TO DEBTS CONTRACTED BEFORE AND WITHOUT REFERENCE TO THE EXISTENCE OF THE RELATION OF PRINCIPAL AND FACTOR.

# I.—GREEN v. FARMER.

May 6, 1768.—E. 4 Burr. 2214.

THIS was a case reserved for the opinion of the court, at a trial at *Nisi Prius* at Guildhall, before Lord Mansfield, at the sittings after Trinity Term, 1767. It was an action of trover for several parcels of serges and rackers. "Not guilty" was pleaded, issue joined, the cause tried, and a case stated.

It was argued first on Tuesday, 17th November last, by Mr. Mansfield, for the plaintiffs, and Mr. Wallace, for the defendants; and the parties desired a second argument. In pursuance of which desire, it came on again on Tuesday, 26th January last: when, upon some explanation of the facts, it being thought that they were not quite completely stated, the court desired to be further informed of the course of these dealings, as it is a question of general consequence. And the counsel agreed to amend the case, which they afterwards did.

The case, when amended, stated the following facts.—It appeared in

evidence that Messieurs Heinzleman purchased from the plaintiffs the goods in question, by the intervention of their packer: and they were delivered to the defendants, their dyers, to be dyed upon their account, on 12th July, 1766. That afterwards, Messieurs Heinzleman and the plaintiffs agreed "that the plaintiffs should have their goods back again," who demanded them from the defendants, offering to pay what was due for the dyeing. But the defendants insisted upon being paid a debt due from Messieurs Heinzleman for dyeing other goods, over and above what they owed for the dyeing of these goods. That the occasion of Messieurs Heinzleman's agreeing "that the plaintiffs should have their goods again," was their \*having failed in their circumstances. And [\*347] it was proved "that after notice of their failure, the defendants delivered eleven pieces to Messieurs Aston and Hodgson, which had been bought of them by the packer of Messieurs Heinzleman, on their account, and sent, in like manner, to the defendants to be dyed on their account, without insisting upon being paid more than what was due for dyeing these eleven pieces;" and "that they also delivered to the plaintiffs five pieces in white, without having paid anything."

It was further stated, that the goods, for the charge of dyeing whereof the defendants claim to retain the goods now in question, had been sent in to them, dyed, and returned at the several times specified in their account. And it appeared from that account, that all the goods, for the dyeing whereof the defendants now insist upon being paid before they will part with this last parcel of serges and rackers, were returned without retaining or having any other goods: and that the demand for dyeing those former goods arose from the 1st of January, 1766, to the 10th of June, 1766, and before the 12th of July, 1766. It appeared also, that there were several periods, during which the defendants had no goods in their hands.

A verdict was found for the plaintiffs, £57, and 40s. costs; subject to the opinion of this court upon the following question:—

"Whether, under the circumstances of this case, the defendants have a lien upon these goods, for more than the price of the dyeing?"

On Tuesday last, (the 3d instant,) this amended case was argued by Mr. Dunning, solicitor-general, for the plaintiffs; and Mr. Eyre, Recorder of London, for the defendants.

Mr. *Solicitor-General* argued that the defendants had no such lien, nor any right to retain these goods, for more than the price of dyeing them.

The right to detain depends upon a contract, either express or implied. A tailor loses his right to retain if he stipulates for a particular price. 2 Ro. Abr. p. 92, title "Justification," pl. 1 and 2. So, an innkeeper, if he delivers the horse. If it be brought to him again, he can't retain him for the first debt. \*10th August, 1754, ex parte Shank et al., before Lord Hardwicke. It was held that a ship builder had [\*348] no specific lien upon a ship for repairs, if he parts with the possession, 1 Atkyns, p. 234. So the present right to retain ended with the return of the goods. This brings the question to the nature of the contract, AUGUST, 1858.—16

between these parties. Here is certainly no express contract, to vary the right; nor is there any implied one.

All former accounts were settled to the beginning of the year 1766. These dyers were employed by the merchant to dye his goods, and there were no others dealings between them. From the 3d to the 10th of January, they had no goods of Messieurs Heinzleman in their hands; and that was the case at several other times, particularly from the 10th of June, to 12th of July. Therefore they did not trust to this retaining; they trusted to Heinzlemans' personal security. Therefore they had no right to retain for more than the charge of dyeing these particular goods.

As to the statutes about set-offs, which were mentioned upon the former argument. The fair argument from those statutes is, "that it was thought improper by the legislature to carry the provision further than they have carried it." And it shows too, what the law was before those acts.

As to the supposed inconvenience to trade, and the supposed analogy to the case of a factor,—it is no inconvenience to trade, and is not at all like the case of a factor. The factor is constantly receiving and paying, but the dyer may never receive any more goods to dye.

The whole of this demand was completed on 10th of June. The dyer had no reason to look forwards to the merchant's sending future goods to be dyed. There is just as much reason to retain the goods to answer any other debt, &c.

He cited a case *Ex parte Ockenden*, a miller, in the matter of Matthews, a bankrupt, 1 Atkyns, 235. Matthews was indebted to Ockenden in £286, 7s. 10d. for grinding of corn, and became bankrupt. He had given the miller two promissory notes of £100 each, which became due before the bankruptcy. At the same time, the miller had in his custody a quantity of wheat to grind, and a great number of sacks. No more was due to him for grinding the corn then in his hands than £16, 5s. [\*349] \*Lord Hardwicke held "that the miller had no specific lien upon the corn and sacks, but only *pro tanto* as was due for grinding the corn then in his hands."

In the case of *Demainbray and Metcalfe*, *Precedents in Chancery*, 419, 2 Vern. 691, 698, the pawnee had the jewels always in his possession, as a security for the sums borrowed. But here, what security had the defendants from 10th June, to 12th July, when they had no goods of the Heinzlemans in their hands? This was a subsequent transaction.

In the case of *Downam v. Matthews*, *Precedents in Chancery*, 580, vide 1 Atkyns, 236, there had been mutual dealings for several years, without payment of any money on either side; which the lord chancellor said was a strong presumptive argument of an agreement for that purpose.

In the petition *Ex parte Deeze*, 1 Atkyns, 228, there was evidence that it was usual for packers to lend money to clothiers; and the cloths to be a pledge not only for the work done in packing, but for the loan of money likewise, vide 1 Atkyns, 237. Here the defendants rested upon the personal security of Messieurs Heinzleman.

Mr. *Eyre*, Recorder of London, argued for the defendants, in support of their right to retain. He owned it was hard to maintain the old cases about liens; and that it was not easy to apply them to mercantile transactions. But the right of retainer has been considered (he said) with more liberality of late years; it is now put upon the foot of mere justice. At present a man may have the benefit of it in trover. The case mentioned in that of *Chapman v. Darby*, 2 Vern. 117, "That where there were mutual dealings on account between a bankrupt and another, the other should only answer to the bankrupt's estate the balance of the account," was before the act of parliament. It was the first extension of the common law, by way of liberality. Lord Cowper had come into it sooner, considering it upon the foot of an account current. The courts of common law did not come into it so soon.

In a case at Nisi Prius at Guildhall, it was ruled, "that the defendant could not justify keeping the goods, till he was repaid the duty." It was an action of trover, M. 12 G. 1, before \*Lord Chief-Justice *Eyre*. The plaintiff was captain of a ship, and brought over [\*350] some elephants' teeth, both for his owner and for himself. The owner paid the duty for the whole, and received the whole. The duty was deducted in damages; but he could not detain the goods for it. 1 Stra. 651, *Stone v. Lingwood*.

Lord MANSFIELD.—Most clearly, 'tis not law.

Mr. *Eyre* proceeded.—An attorney may now retain papers, not only till he is paid the particular debt, but for his general balance. The difficulty is how to set it off in trover.

Lord MANSFIELD.—If it can be set off in a court of equity, it may be set off in an action of trover, because it is a lien. It was certainly doubtful before the case of *Krutzer and Wilcocks*, "whether a factor had a lien and could retain for the balance of his general account."

Mr. Justice *Yates*.—Wherever the plaintiff has a lien, he may retain in trover, as well as in any other action, or in a Court of Equity.

Mr. *Eyre*.—It is as reasonable to retain in the present case as in the case of a factor. A factor must often be without goods in his hands, as well as the defendants were here. There is no reason to confine it to the case of a factor. It extends equally to every agent; and consequently to a packer or a dyer, and with equal reason. For the goods are to be considered as a pledge, from the nature of the dealing. He cited the case of *Foxcroft and others*, assignees of *Satterthwaite, v. Devonshire and others*, Hil. 33 G. 2, B. R. And after repeating Lord Mansfield's reasoning in that case, he applied it to the present case. Every article of this debt arose, he said, under the security of a specific lien. The goods came into the defendants' hands in the course of trade and dealing; and a lien upon them is implied in the nature of the transaction. And this tends to the advancement of credit, and the benefit of commerce. As to the case that has been cited, of 10th August, 1754, \*Ex parte *Shank et al.*, 1 Atkyns, 234. There the shipwright [\*351] had departed with his lien. I do not put it upon the principle of the old cases, but upon the principles which have obtained since the case of *Krutzer v. Wilcocks*, 1st February, 1755, 1 Barrow, 494. And

upon these principles the defendant is entitled to the *postea*, as having a lien for more than the price of dyeing.

Mr. *Solicitor-General*, in reply.—The legislature have only taken care of particular cases : they have left this case as they found it. The defendants never had a lien upon these goods for all the several parts of their demand. They had a lien for part of it upon other goods, which lien they have parted with. As to the old cases, I don't rest upon them alone : I mentioned a modern one in 1754. As to the case mentioned in that of *Chapman v. Dormer*,—that was upon a bankruptcy, where one party would otherwise pay the whole of what is due from him, and receive only a part of what is due to him. The case of the jewels is very strong. And the Court of Chancery will not suffer a mortgagee to redeem till he has paid all that is due. *Ockenden's case* and *Deeze's* are reconcilable. But if they are not, the latter opinion must be the authority.

The case of *Krutzer v. Wilcocks* differs from this case, because that was the case of a factor, who is not in the same case with a dyer, who does not proceed upon the same ideas of future employment. The latter can have a right to retain only whilst they keep possession. In that case, the factor remained in possession of the goods ; here the dyers parted with the goods upon which they had a lien for the former demand.

As these goods were sent to the dyer for a particular purpose, he ought not to retain them for a general purpose. The particular purpose being served, the right to the goods results to the owner.

It was ordered to stand over to this day, Friday 6th May, for the opinion of the court.

Lord MANSFIELD now delivered the opinion of the court.—The case is the same as if the action had been brought by \*Messieurs [\*352] *Heinzleman*, for the plaintiffs stand in their place ; and so I shall consider it. The general question is,—“ Whether the plaintiffs in this action should be obliged to do justice to the defendants by paying what is due to them, before they are entitled to demand the goods from them, and to recover their value in case of refusal ? ” Natural equity says, That cross demands should compensate each other by deducting the less sum from the greater, and that the difference is the only sum which can be justly due. But positive law, for the sake of the forms of proceeding and convenience of trial, has said that each must sue and recover separately, in separate actions.

It may give light to this case and the authorities cited, if I trace the law relative to the doing complete justice in the same suit, or turning the defendant round to another suit, which, under various circumstances, may be of no avail.

Where the nature of the employment, transaction ; or dealings, necessarily constitutes an account consisting of receipts and payments, debts and credits, it is certain that only the balance can be the debt ; and by the proper forms of proceeding in courts of law or equity, the balance only can be recovered. After a judgment or decree “ to account,” both parties are equally actors. Where there were mutual debts unconnected, the law said they should not be set off ; but each must sue. And courts



of equity followed the same rule, because it was the law; for, had they done otherwise, they would have stopped the course of law in all cases where there was a mutual demand. The natural sense of mankind was first shocked at this in the case of bankrupts; and it was provided for by 4 Ann. c. 17, § 11, and 5 Geo. II. c. 30, § 28. This clause must have everywhere the same construction and effect; whether the question arises upon a summary petition or a formal bill, or an action at law. There can be but one right construction, and therefore if courts differ one must be wrong. Where there was no bankruptcy, the injustice of not setting off (especially after the death of either party) was so glaring that parliament interposed by 2 Geo. II. c. 22, § 13, and 8 Geo. II. c. 24, § 5. But the provision does not go to goods or other specific things wrongfully detained; and therefore neither courts of law nor equity can make the plaintiff who sues for \*such goods, pay first what is due to the defendant, except so far as the goods can be construed [\*353] a pledge; and then, the right of the plaintiff is only to redeem. The convenience of commerce and natural justice are on the side of liens; and therefore of late years courts lean that way—1st, Where there is an express contract; 2dly, Where it is implied from the usage of trade; or, 3dly, From the manner of dealing between the parties in the particular case; 4thly, Or where the defendant has acted as a factor. The case *Ex parte Ockenden* was well considered. Lord Hardwicke's bias was strong on behalf of liens; and his own determination in the case *Ex parte Deeze* had been almost in point. Yet he took time to consider it and search for precedents. And after consideration, he thought he could not construe it within the mutual-credit clause of the Bankrupt Act, unless it could be so construed in an action of trover. (And that is certainly so.) He rested upon there being no room in that case to imply a lien, from usage of trade, or from the particular manner of dealing. This case, and that *Ex parte Deeze*, are well reported in the printed books; but I will read you my note of both. [Accordingly, he read his own note of the case.] This was in August, 1754, and it stood over; and on 20th December, 1754, no precedents being found, he determined accordingly. And no precedents are cited since the 20th December, 1754. Then his lordship read his own note *Ex parte Deeze*, on the bankruptcy of Norton Nicholls—"That the assignees could not take the goods from the petitioner, without making satisfaction for the whole of his debt. As to a lien in that case, from the nature and course of dealing, the evidence is not clear." The opinion was "that the petitioner should be paid his debt, before the goods were taken out of his hands." Though Lord Hardwicke took notice of the evidence of usage, he said, it was not very clear. He thought it hard that mutual credit should only relate to pecuniary demands, though goods can only be paid for in money; and in that case there was an account between the parties, wine on one side, and package on the other. I have inquired into the case *Ex parte Deeze*, and the affidavit of the book-keeper, [which he particularly stated.] If the usage there stated be true, the packer was in the nature of a factor, and, as such, had \*a lien for the general [\*354] balance. It was settled in 1755, "that a packer, being in the

nature of a factor, would be entitled to a lien." Apply this to the case *Ex parte Ockenden*, and to the present case. In this case the defendant acts in no respect as a factor, but merely as a manufacturer to dye. There is no express contract "to pledge;" no usage of trade, no argument from their particular dealing; on the contrary, it appears that he trusted to Messieurs Heinzleman's personal credit only. The defendants never detained any goods to answer their debt; but from the 1st of January to 10th of June gave all back, for the dyeing of which they now claim to detain, without having any new cloths sent in. After notice of the failure of Heinzleman, they delivered eleven pieces to Aston and Hodgson, without a claim. It is sufficient that no contract can be implied to give a lien for the balance, from any usage of trade or manner of dealing; but it is much stronger, when the manner of dealing shows the contrary, and that the defendants relied on personal credit only. Therefore we are all of opinion "that there is no lien here, beyond that which is given by the general rule of law, which never was disputed."

Postea to be delivered to the plaintiffs.

N. B.—The price of dying was deducted at the time of taking the verdict; the value of the goods in white being only thereby given to the plaintiffs.

## II.—HOUGHTON v. MATTHEWS.

June 29, 1803.—E. 3 Bos. & Pull. 485.

**TROVER** for a quantity of indigo.

This cause was tried before Mr. Justice Rooke, at the last Lent assizes at Lancaster, when the following facts appeared in evidence:—The defendants, who were brokers, had, on the 3d of September, 1799, sold a parcel of logwood and fustic to Jackson, the bankrupt, and on the [355] 11th of the same month, a \*parcel of indigo, neither of which parcels were paid for at the time of Jackson's bankruptcy. The logwood and fustic was the property of a person of the name of Greatham, and the indigo of a person of the name of Dixon; both these parcels had been put into the hands of the defendants by the proprietors, to be sold by them as brokers, and both sales were effected in the names of the brokers only, it being their practice to sell in their own name, where the party for whom they sold was indebted to them. At the time of such sales, and when this action was commenced, there was a balance due both from Greatham and from Dixon to the defendants. Soon after the above sales, Jackson, the bankrupt, put into the hands of the defendants the indigo in question, to sell as brokers; no advance being made by them upon the indigo, nor any debt existing between the defendants and Jackson, other than what was due to the former for the goods of Greatham and Dixon, purchased by Jackson of the defendants as before mentioned. Indeed the commission to sell the indigo in question was the first time the latter had ever employed the defendants as brokers. While the in-

indigo in question still remained unsold in the hands of the defendants as brokers, Jackson became a bankrupt. Upon this the plaintiffs, as his assignees, demanded the indigo, and tendered payment of any charges which might have been incurred in respect of that article; the defendants refused to deliver it up, claiming a lien upon it for the debt due from the bankrupt, in consequence of the goods of Greatham and Dixon sold to him, and which still remained unpaid for. The learned judge was of opinion that the defendants had no lien upon the goods in question, and therefore, under his direction, a verdict was found for the plaintiffs, with leave reserved to the defendants to move to set that verdict aside, and have a nonsuit entered.

Accordingly, a rule *Nisi* having been obtained in last Easter Term, *Lens*, Sergt., now showed cause.—The question is, Whether, because the defendants, as brokers to two persons of the names of Greatham and Dixon, formerly sold goods to the bankrupt \*Jackson, for which their principals Greatham and Dixon have not been paid by the [\*356] bankrupt, they the defendants have a right to detain the goods in dispute, which were put into their hands as brokers by the bankrupt, and to pay Greatham and Dixon out of the proceeds thereof? To entitle the defendants to this lien which they claim, they must either show that the bankrupt is indebted to them personally upon a general balance of accounts, or that they have advanced money upon the particular goods which they refuse to deliver up. It appears, however, that no money was advanced upon the goods, and as this was the first instance in which the defendants were employed by the bankrupt as his brokers, there could be no balance in their favour. In fact, Greatham and Dixon now endeavour to obtain a lien upon the goods, through the intervention of the defendants, and thus to pay themselves the debt owing to them from the bankrupt. Had the defendants sold for Greatham and Dixon under a *del credere* commission, they would have been personally liable to their principals, and therefore might have considered the goods as their own, and have claimed all the rights of principals arising therefrom. But the defendants, though they sold in their own names, still were not responsible to their principal for the proceeds of what they sold, and therefore the parties to whom they sold became debtors to the persons for whom they sold. The mode in which the defendants, for their own convenience, made out their sale accounts, cannot invest them with any rights which do not result from the nature of the transaction itself. The estate of the bankrupt will remain indebted to Greatham and Dixon, but there is no liability under which the defendants can be called upon to pay that debt. In *Grove v. Dubois*, 1 T. R. 112, it was held that a broker, with a *del credere* commission, might set off to the same extent as a principal; but there the court expressly take the distinction of his being a broker acting under a *del credere* commission. The same principle was recognised in *George v. Clagett*, 7 T. R. 359; and, indeed, there the decision of the court was not in favour of the broker, for it only gave a purchaser under him as such broker, a set-off against his principal.

\**Heywood*, Sergt. contra.—It is supposed, for the sake of the argument, that a broker selling for a third person has no more [\*357]

property in the goods than a mere stranger, whereas by the deposit of the goods in his hands he acquires a special property in them. Now in *Kruger v. Wilcox*, Ambl. 253, Lord Hardwicke says, in cases of bankruptcy, "if any person has a specific lien or a specific property in goods, which is clear and plain, it shall be reserved to him notwithstanding the bankruptcy." The goods sold to the bankrupt were not sold as the goods of Greatham and Dixon, but in the name of the defendants; that circumstance was of itself sufficient notice to the bankrupt, that the defendants meant to claim a lien upon the goods subsequently put into their hands by him. The case of *Gonsalez v. Sladen*, Bull. N. P. 130; 2d edit. clearly proves that the broker may maintain an action in his own name against the vendee of the goods. It is contended, indeed, that none but brokers acting under a *del credere* commission can claim this lien which the defendants insist upon; but it should be remembered, that the very ground upon which lien is allowed is to protect the broker from loss; and that a broker who advances money to his employers upon the confidence resulting from his rights as a broker, has at least as good a claim to a lien as he who, acting under a *del credere* commission, only makes himself liable to his principal for any possible losses which may occur. Now, in this case the defendants had advanced money to Greatham and Dixon, for both these persons were indebted to them on the balance of accounts, both at the time of the sale and the detainer of the goods in question, though it is true that they did not specifically advance money in respect of the goods, sold by them to the bankrupt. In *Atkins and Another v. Amber*, 2 Esp. N. P. Cas. p. 493, it was holden that brokers not selling under a *del credere* commission might maintain an action against the vendee for the price of the goods sold, the principal being at that time in their debt for money advanced upon those goods; and Lord Chief-Justice Eyre was of opinion, that it was no objection to the recovery by the brokers, that the declaration stated the contract to have been made with them, whereas the sale-note stated that the goods were sold on account of the principal. And in *Drinkwater v. Goodwin*, Cowp. 251, [\*358] Lord \*Mansfield says, "We think a factor who receives clothes, and is authorized to sell them in his own name, but makes the buyer debtor to himself, though he is not answerable for the debts, yet he has a right to receive the money. His receipt is a discharge to the buyer, and he has a right to bring an action against him to compel the payment."

*Cur. adv. vult.*

There being a difference of opinion upon the bench, the learned judges now delivered their opinions *seriatim*.

CHAMBRE, J.—The question is, Whether when a broker receives goods to sell for A. he is entitled to retain them though unsold, after a tender of all charges due in respect of those goods, on the ground of a lien for the price of other goods sold by him for B. to A. under a general authority from B. to sell, there being no general balance due from A. to the broker, and the broker not having sold the goods of B. under a *del credere* commission? I state the question thus, because I conceive that, in the present case, the mere act of the bankrupt buying goods of the defendant

did not constitute the relation of principal and factor between them. The demand of the defendant upon the first goods did not arise out of any course of dealing in the relation of principal and factor, but was as foreign to that relation as if it had arisen upon a legacy, or any other species of debt, the most remote from that course of dealing. I do not find any authority for saying, that a factor has any general lien in respect of debts which arise prior to the time at which his character of factor commences; and if a right to such a lien is not established by express authority it does not appear to me to fall within the general principle upon which the liens of factors have been allowed. It seems to me that the liens of factors have been allowed for the convenience of trade, and with a view to encourage factors to advance money upon goods in their possession, or which must come to their hands as factors; but debts which are incurred prior to the existence of the relation of principal and factor, are not contracted upon this principle. And if the lien now contended for were allowed, instead of inducing persons to place goods in the hands of factors, it \*would operate the contrary way, since it would tend to prevent [\*359] insolvent persons from employing their creditors as factors, lest the goods entrusted to them should be retained in satisfaction of former debts. If this were the only point in this case, I should be of opinion that the defendants were not entitled to retain; but laying this point out of the question, I still think the debts due from the bankrupt, in respect of the goods sold to him, are not to be considered as due to the defendants, so as to authorize them to set off such debts, in an action brought against them by the bankrupt's assignees, and that the defendants have no property or interest whatever in those debts. I never yet heard of a person being allowed to protect himself, by setting up debts in reality due to other persons; or that a factor, having no demand on his principal, could, by transactions with a third person, create a new interest in himself. In the case of *Drinkwater v. Goodwin*, Lord Mansfield says, "It shall not be in the power of any man, by his election, to vary the rights of two other contending parties." According to this rule, the factor has no right to prejudice the title of his principal. That a factor has a lien for his general balance, is a point too well established to be disputed. The case *Kruger v. Wilcox* proves nothing more. Where a factor is in advance for goods by actual payment, or where he sells under a *del credere* commission, whereby he becomes responsible for the price, there is as little doubt that he has a lien on the price, though he has parted with the possession of the goods. If he acts under a *del credere* commission, he is to be considered as between himself and the vendee, as the sole owner of the goods. There is no doubt of the authority of a factor to sell upon credit, *Willes*, 406, though not particularly authorized by the terms of his commission so to do; but if he sell without a *del credere* commission, it is well established that he does not become a surety; the debt is due to the owner of the goods only. Many cases have been cited, which do not appear to me to warrant the inferences drawn from them. In *Gonsalez v. Sladen*, it is said, that if the factor of a person beyond sea buy or sell goods, he may sue and be sued in his own name; for if he buy, the credit is presumed to be given to him;

and if he sell, the promise is presumed to be made to him. But where [\*360] the principal \*resides abroad, he is presumed to be ignorant of the circumstances of the party with whom his factor deals, and therefore the whole credit is considered as subsisting between the contracting parties. The sentence in Buller's *Nisi Prius* immediately following the case of *Gonsalez v. Sladen*, was not cited. There it is said, that "a factor's sale does, by the general rule of law, create a contract between the owner and buyer; and therefore if a factor sell for payment at a future day, if the owner give notice to the buyer to pay him, and not the factor, the buyer would not be justified in afterwards paying the factor." The factor therefore has no right to consider himself as substantially the creditor of the vendee of the goods; he has no equity in his favour, and the account is really and truly between the vendee and the principal. It is true that Mr. J. Buller adds, "yet perhaps, under some particular circumstances, this rule may not take place, as where the factor sells the goods at his own risk, (*i. e.*, is answerable to the owner for the price, though it be never paid) for in such case he is the debtor to the owner, and not to the buyer." Neither the case of *Rabone v. Williams*, nor that of *George v. Clagett*, appear to me to have any application to the present. The principle upon which those cases proceeded is well summed up in Cullen's *Bankrupt Laws*, viz., that where a party being only an agent, acts ostensibly as the real and sole owner, (as in the case of a factor concealing his principal, or an acting partner his partners,) the buyer of goods from him may, in an action by the principal in the one case, or the firm in the other, set off a debt due to him from the factor or acting partner respectively, upon the ground that the parties by their conduct, having enabled their agent to gain credit as the sole owner, and the buyer having *bona fide* contracted with him in that character, they cannot recover against the buyer, without allowing him the same advantages and equities in his defence that he would have had against their agent. There is a case of *Garratt v. Cullum*, Bull. N. P. p. 42, last edit., and which is also cited in *Scott v. Willes*, 405, which fully proves the doctrine that the debt of the vendee is not due to the factor. In that case the factor of a person living in Ireland having sold goods to a person living in London, without acquainting him with the name of his principal, or acquainting \*his principal with the name of his vendee, [\*361] became bankrupt; after which the vendee paid the money to his assignees; the principal then brought an action against the assignees and recovered, it being held that though the vendee was discharged by the payment to the assignees, yet the debt was not in law due to them but to the principal, and therefore did not pass under the assignment. That case is said in *Willes* to have been cited at Guildhall by Lord Chief-Justice Parker, with approbation. These cases appear to me to establish, that where a factor has no special claim on the goods, and he has disposed of them, whereby he has lost the advantage arising from possession, the debt is to be considered to all intents as the debt of the principal, and the factor has no lien on the price. My brother, Heywood, mainly relied upon the case of *Drinkwater v. Goodwin*, whereas the court throughout that case evidently proceed on the ground of the factor

having given his security for the payment of the goods, and thereby acquired a lien on them in the same way as if he had advanced his money on the goods themselves. The principle upon which that case was decided is very correct; but why did the decision proceed upon that principle, unless with a view to distinguish it from cases circumstanced like that now before the court? It is unnecessary to enter at large into all the positions on this subject, which are laid down in the books; many of which are very clearly stated in *Scott v. Surman*. It has been observed, that though a broker does not act under a *del credere* commission, still he may bring an action in his own name for goods sold by him. This power, however, is incident to the nature of his employment, as also that he should be able to give discharges to those from whom he receives money in payment of goods sold on account of the persons for whom he acts. But these circumstances do not prove that he has any interest in the goods which pass through his hands. How would this case have stood, if the defendants had never become creditors of Greatham and Dixon? It has not been argued, that in such case there could have been any lien; and yet how can any right between the defendants and the bankrupt be altered by a subsequent course of dealing between the defendants and third persons? The rights of lien and detention must have existed \*at the time when the goods of Greatham and Dixon [\*362] were sold to the bankrupt, and cannot be varied by the subsequent conduct of Greatham and Dixon towards the defendants, unless the bankrupt has been privy to their transactions. Under all these circumstances, and finding no authority which warrants the factor in claiming any such lien as is claimed in this case, I must deliver my opinion that the defendants have failed in the defence set up by them, and that as they were fully satisfied in all they had a right to demand, the learned judge was perfectly correct in his directions to the jury.

ROOKE, J.—This question arises in an action of trover, and must be decided by the rules of law. Cases which have been decided by the lord chancellor, on the principles of general equity at the hearing of bankrupts' petitions, must not give the rules for our decision in the courts of law. Lord Hardwicke very cautiously takes the distinction in two cases, namely, *Kruger v. Wilcox*, Ambl. 253, and *Ex parte Deeze*, 1 Atk. 228. In the first of these cases he says, "whether this was ever allowed in trover at law, where the goods were turned into money, I cannot say, nor can I find any such case. I have no doubt it would be so in this court if the goods remained in specie, nor do I doubt of its being so where they are turned into money." In the latter case he says, "and here, though there had been no bankruptcy in an action for these goods, the debt could not have been set off; yet as the clause of mutual credit has been extended, I think it may come within that rule." In the case before the court, there is no doubt that the defendants had a lien on the goods sent to them by Dixon and by Greatham, for their general balance while the goods remained in their hands, and if they had received the money for these goods, they might have retained it for the balance due to them. But when they parted with the goods they parted with their lien; and if they were at that time creditors of Dixon and of Greatham,

(which was not directly proved at the trial,) they were on the same footing as the other creditors. Having then a claim on the general effects of Dixon and Greatham, Jackson, to whom they had sold some of their goods, sends them goods to sell, and while these goods remained unsold, [\*363] \*becomes bankrupt; the defendants claim to retain these goods for a debt due to Dixon and to Greatham; because if Jackson, instead of sending goods to them as factors, to sell for him on his own account, had sent them money to pay for the goods he bought of them, they might have retained the money for debts due to them from the house of Dixon or of Greatham. The doctrine of liens has already been carried very far, but I cannot find that it has yet been carried so far as to permit a factor to retain for all possible demands which he may choose to make on the goods sent to him. Here the defendants are supposed to have a demand and a right of action against Dixon and against Greatham, who, for aught we know, are each of them solvent. The defendants are not answerable to them for the value of the goods sold to the bankrupt, nor have they advanced any money on them. The bankrupt is indebted to the house of Dixon and of Greatham, for the price of the goods sold to him on their account by the defendants. The defendants then are middle-men, not answerable to Dixon or to Greatham, and have no claim upon the bankrupt in their own right except for the expenses due on the goods he has sent to them, which expenses have been tendered to them. I doubt (but with great deference to my lord chief-justice, who has had so much experience in courts of equity) how far equity would assist such a claim, since it is not necessary to secure the factors themselves, but is set up only for the benefit of other persons. I question whether the creditors at large of the bankrupt Jackson have not an equitable as well as legal claim, equally well founded with that of Dixon and of Greatham. This is an attempt, through the means of these defendants, to give the houses of Dixon and of Greatham a preference above the other creditors. The assignees have made out their case as plaintiffs; the defendants set up this lien by way of defence: it is incumbent on them to make out a clear case; they are not entitled to have presumptions made in their favour; and the court can only judge from the facts actually proved by them. On the whole I am satisfied that at law, and in this action of trover, the defendants cannot support this claim of a lien. My opinion therefore is, that the rule for a new trial should be discharged.

[\*364] \*HEATH, J.—I am of the same opinion with my brothers Rooke and Chambre, who have so fully discussed the principles and authorities relating to the subject that it is unnecessary for me to enter into the matter at length. The defendants claim a right to retain the goods in question as brokers, not in respect of any debt due to themselves upon the goods, but in respect of a debt which they say is due from the bankrupt to them, but which, in truth, is due to Greatham and to Dixon. That part of the case has been very satisfactorily argued by my two brothers who preceded me. There are two species of liens known to the law, namely, particular liens and general liens. Particular liens are where persons claim a right to retain goods in respect of labour or money expended upon them; and those liens are favoured in law.



General liens are claimed in respect of a general balance of account ; and these are founded in custom only, and are therefore to be taken strictly. There is no authority to show that such custom has ever been extended to debts generally ; and the opinion of Lord Hardwicke in *Ex parte Deeze*, which is one of the first cases in which a party was allowed to retain for a general balance, seems directly to the contrary. From the report of that case in 1 Atk. 229, it appears as if the decision had been founded on the 2 Geo. II. respecting mutual credits ; but that report is not correct ; for in *Ex parte Ockenden*, 1 Atk. 237, Lord Hardwicke, speaking of the case *Ex parte Deeze*, says, “ there was evidence that it was usual for packers to lend money to clothiers, and the clothes to be a pledge not only for the work done in packing, but for the loan of money likewise.” In that case, therefore, a right was claimed to retain for a general balance of accounts, Deeze having been a creditor of the bankrupt for money advanced to him as a packer and merchant, antecedent to the time of the particular goods being put into his hands. From the expression of Lord Hardwicke also, 1 Atk. 229, these goods were in the petitioner’s hands as a pledge for some part of his debt, namely, the price of the packing ; “ and what right has a court of equity to say, that if he has another debt due to him from the same person, the goods shall be taken from him without having the whole paid ? ” we may collect that he did not think the petitioner entitled to retain for the whole, independent of the \*custom. The case of *Drinkwater v. Goodwin* proceeded on a special agreement independent of the [\*365] custom. The agreement was stated and relied on ; and Lord Mansfield says, “ the agreement therefore is, that he shall have a lien.” There is no authority therefore for the position, that a factor may retain goods in his hands in respect to all debts whatsoever ; and there is a rule of law which has not been touched upon in argument, and which appears to me decisive of the contrary, namely, that nothing can fall within the custom of trade but what concerns trade. Collateral obligations, therefore, such as money due for rent, are not within the custom which authorizes a factor to retain for a general balance.

LORD ALVANLEY, Ch. J.—When this motion was first made, I inclined to think my brother Rooke’s direction proper ; but having heard the argument and looked further into the question, I find myself under the necessity of differing from my brothers so far, as to think that a verdict ought not to be entered for the plaintiff on the facts stated in the report. Farther than that, however, I do not go. I am by no means prepared to say, that a verdict ought to be entered for the defendants ; for I think that if a new trial were granted, some facts might be established which are now equivocal, and which would give rise to a question of so much importance, that I should wish to take more time for consideration before I decided against the defendants’ right to a lien. It was not distinctly proved at the trial, that Greatham and Dixon were indebted to the defendants, but we must suppose that fact capable of proof. If, however, the fact itself would make no difference in the determination of the court, there is no reason for sending the case to a new trial in order to have it found. At present, therefore, I must suppose that the case

affords sufficient ground to infer that Greatham and Dixon were indebted to the defendants. These persons then having put goods into the hands of the defendants, with authority to sell them in their own names, and consequently to bring actions and give receipts for the money; and the defendants having accordingly executed their commission by selling in their own names, and Greatham and Dixon being still in their debt, the [\*366] defendants acquired a \*right to demand the value of the goods from the persons to whom they were sold. The cases cited have, I think, decisively proved that point. Nor does it make any difference, whether the goods were sold under a *del credere* commission or not. The only effect of a *del credere* commission is, to make the factor responsible for the value of his goods to his principal. If the factor, without such a commission, sell the goods in his own name, he may bring an action for the value; and if the principal bring the action, the vendee may set off a debt due to him from the factor. The factor, therefore, being authorized to bring an action for the value of the goods, may retain the whole amount in satisfaction of the debt due to him from his principal. We are to consider, then, in the first place, what relation was created between these parties, by those circumstances which took place subsequent to the sale of the goods belonging to Greatham and Dixon; remembering that at the time of that sale, the defendants were the factors of Greatham and Dixon only, and not of the bankrupt. That subsequent to that period, and while the bankrupt still remained indebted for the goods of Greatham and Dixon, which he had received from the defendants, he sends the goods in question to the defendants to be sold by them as his brokers, knowing that he stood indebted to them for the goods of Greatham and Dixon, though he did not know but that the defendants themselves were the proprietors of the goods, the names of Greatham and Dixon not having been communicated to him. Consequently the bankrupt must have considered his debt as due to the defendants; and the moment he sent goods to them as brokers their right of lien attached upon the goods. If the defendants had sold the goods, it is clear that they might have applied the money arising out of the sale in discharge of the debt due from the bankrupt, on account of the goods of Greatham and Dixon; and how do we know that they did not forbear to sell, because they considered the goods as a security for that debt? Whatever may be the case with respect to other trades, it is not now denied that a factor has a right to retain for the general balance of his account. If a debt be due from the principal to the factor, antecedent to the time of the particular goods being put into the hands of the latter, [\*367] he is entitled to retain them as a \*security. And if a man commence dealing with a factor, to whom he is indebted on bond, I am not prepared to say that the lien of the factor would not attach upon such debt. In the present case, however, the goods of Greatham and Dixon were sold by the defendants as factors, and the debt therefore arose in the ordinary course of their dealing as factors. The case of *Drinkwater v. Goodwin* was, I admit, the case of a particular contract, but the principle of the decision was, that if a factor become surety for his principal, he has a lien to the amount of the sum for which he be-

comes surety. The case of *Grove v. Dubois* establishes, that a broker acting under a *del credere* commission, may set off against his principal the amount of losses incurred; and the cases of *George v. Clagett*, and *Rabone v. Williams*, show, that if a factor sell the goods of his principal in his own name, the buyer may set off against the principal a debt due from the factor. It appears to me, therefore, that a factor who sells in his own name, stands in the same situation with respect to lien as if he had a *del credere* commission. I do not wish to be bound by my present opinion, but as the case strikes me, the present defendants are warranted, by the custom of merchants, in claiming a lien upon the goods now sued for. It is contended, that the defendants only set up this lien with a view to protect Greatham and Dixon. But I cannot assent to a proposition which assumes that Greatham and Dixon are solvent. The presumption rather is that they are insolvent since they have not paid the debt due from them to the defendants; and the question is, Whether the latter are not justified in retaining the goods in their hands as a security against the insolvency of their debtors? With respect to the authority of the cases which have been cited from the court of chancery, it is true that courts of equity, in administering justice, sometimes go further than the courts of law. But it is clear that the lord chancellor has no authority to screen goods in the hands of a factor, with a view to distribute them in equity according to a different course from that which prevails at law; and if Lord Hardwicke had entertained any doubts upon the rule of law, he would certainly have taken the opinion of some common law court. I can hardly conceive the case *Ex parte Deeze* to be well reported; for according to the report, Lord \*Hardwicke seems to suppose that in cases of bankruptcy, if a person has a [\*368] lien to a certain amount, there is no harm in giving him a lien to the whole amount of his claim. But to such a proposition no lawyer can assent. The other ground of determination supposed to have been stated by his lordship, namely, the clause of mutual credit, certainly cannot be sustained. The decision therefore must rest upon the ground of lien; and in the subsequent case *Ex parte Ockenden*, Lord Hardwicke states the real principle upon which the case *Ex parte Deeze* must have proceeded; for he says, "in the case *Ex parte Deeze*, there was evidence that it was usual for packers to retain not only for work done, but for money lent." These cases were followed by some other determinations in equity, which I do not think it necessary to mention, as there are cases at law. In *Green v. Farmer*, 1 Black. 652, 4 Burr. 2221, Lord Mansfield says, "the convenience of commerce and natural justice are on the side of liens, and therefore of late years courts lean that way." He then states, that lien may arise not only from express contract, or where the party has acted as a factor, but that it may be implied from the usage of trade, or from the manner of dealing between the parties in the particular case. Indeed he considers Lord Hardwicke as having decided the case *Ex parte Ockenden* (which at first view seems not so favourable to liens as his opinion in *Ex parte Deeze*) on the special ground that there was no room to imply a lien from the usage of trade or the particular manner of dealing. The case of *Kruger v. Wilcox* had

before established, that if there be a course of dealings and general account between a merchant and a factor, and a balance is due to the factor, he may retain the ship and goods, or produce, for such balance of the general account: it is considered as an interest in the specific things, and they are made articles in the general account. In that case Lord Hardwicke speaks only of a foreign factor, but there is no doubt that a home factor is entitled to the same lien, though the *lex mercatoria* seems to found the origin of the custom on the merchant residing abroad. *Kruger v. Wilcox* is recognised in *Foxcroft v. Devonshire*, 2 Burr. 937, and in *Walker v. Birch*, 6 T. R. 262, Lord Kenyon considers the factor's right to his lien for a general balance as so long [\*369] \*settled, that it ought not to be brought into dispute; he says, it is an agreement which the law implies. The opinion, indeed, of Mr. Justice Lawrence in that case may seem to support the opinion of my brothers; for he says, that the doctrine of lien only applies to cases where the goods had been deposited in the nature of a pledge; that the persons for whom the lien was then claimed never acted as the brokers of their principal before the transaction in question, and consequently that the goods could not be considered as deposited with the former as a general pledge. The question, however, is, Whether a factor be not that sort of person that all goods which come into his hands are to be considered as clothed with a lien for his general balance? In *Co. Bank. Law*, p. 455, ed. 1797, it is laid down, that where one has acted as factor for another, everything in his hands is construed to be a pledge not only for incidental charges, but as an item of mutual account for the general balance due to him. The only point in difference between my brothers and myself is, Whether this debt due on account of the goods for Greatham and Dixon, be such a debt as can be brought into a mutual account between the defendants and the bankrupt? I am not desirous of favouring liens to so great an extent as has been done by the courts of late; for we know it has been determined that the members of any trade may, by agreement among themselves, obtain the benefit of that sort of lien to which a factor is entitled by the general law. I am sorry the courts have gone so far. In this case, however, I feel that the defendants are in possession of a principle of law which has never been denied, and that being commissioned by another to sell goods for him, they acquired a right to retain those goods in satisfaction of any demands which might be due to them from the person who sent the goods. The moment the goods were sent, the relation of principal and factor arose; and when that relation commenced, the right to a general lien attached. I desire not to be considered as giving a positive opinion, but my doubts incline me to think that the court is justified in entering a verdict for the plaintiffs.

Rule discharged.

## \*III.—SIBBALD v. GIBSON.

[\*370]

Dec. 11, 1852.—S. 15 D. 217.

GIBSON AND CLARK, corn-merchants in Glasgow, were employed during the years 1850-51, by J. S. Sibbald, corn factor, Leith, in several transactions relating to the purchase and sale of grain. In December, 1850, they were instructed by Sibbald to buy for him a large quantity of Irish oats, which they were to retain for him, and sell at an after period. They accordingly purchased 2300 bolls, which they placed in store for his behoof, the price being paid by Gibson and Clark drawing upon Sibbald, and discounting his acceptance. It was agreed that when the oats were sold, Gibson and Clark were to charge only one commission for both purchase and sale. The oats, however, were not sold by Gibson and Clark, but were sold by Sibbald himself, in small parcels, which Gibson and Clark forwarded to different parts of the country by his orders. In the course of a correspondence which had previously taken place about the sale of the oats, Gibson and Clark had more than once mentioned that their commission, including both purchase and sale, would be four per cent. Sibbald complained of this being too high, but no arrangement was come to as to what the amount of the commission was to be. In a letter by Gibson and Clark to Sibbald, in June 1851, in reference to a parcel of the oats which the latter had sold, they said,—“It may be as well to mention here, notwithstanding you may sell these oats yourself, that we expect our commission of four per cent.” Sibbald made offer of a commission of one per cent. upon the purchase of the oats, which by a subsequent offer was increased to one and a half per cent.

In the end of September, 1851, Sibbald forwarded to Gibson and Clark a quantity of beans, his property, for sale. By letter of date 9th September, 1851, he wrote to Gibson and Clark in reference to this consignment—“I understand the rate of commission, in event of your going on to sell for me, is 3% for credit and guarantee. These sold, I could send you plenty more.” Some time thereafter Gibson and Clark intimated by letter to Sibbald that they had sold the beans, and they at the same time transmitted account sales, by which the net proceeds were shown to be £72, 16s. In this letter they stated,—“We \*are making up account current, and shall hand you the balance to- [371] morrow.” The account current was transmitted on the following day, and in it Gibson and Clark took credit for £56, 4s. 3d., as three per cent. commission on the oats. Sibbald having refused to allow this charge, the result was an action at his instance against Gibson and Clark, concluding for the balance of the price of the beans. Probation was renounced by both parties.

*The Pursuer Pleaded*;—That there was not any room for the claim of retention put forward by the defenders. They did not stand in a situation entitling them to state the plea of retention, and the right claimed by them was of a nature which had never been recognized by law. The oats in question had been purchased by the defenders, under  
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the idea that they were also to sell them again—and one commission was to be charged on purchase and sale. They did not succeed in selling them, and the pursuer, as he was entitled to do, with their entire consent, took possession of them, and sold them himself. If they possessed a lien over the oats for their commission, it was entirely abandoned, for they were given up without any attempt to enforce it. There was a delivery over by the defenders of every subject over which any right of lien could extend, and nothing remained in their hands which could be subject to any such right. The question was, whether their right could be subsequently revived, on the separate and independent transaction as to the beans. There was not here any continuous course of dealing or proper account current between the parties; but the attempt was, to enforce a special lien which the defenders might have had upon the oats, against the separate and distinct consignment subsequently made to them of the beans. Further, the defenders ought to have given notice to the pursuer if they meant to insist upon their claim for commission, when they received the letter of 9th September, intimating the consignment of the beans. The terms on which the beans were put into their hands, were very much those of a special contract, that they were to sell for a three per cent. commission, and account for the balance, and on a fair construction excluded the claim now made.

[\*372] *\*The Defenders Pleaded;*—The cargo of beans was sent in the knowledge that the defenders were entitled to a commission from the pursuer, although the amount had not been settled. No principle had been stated on which it could be held that the defenders were not entitled to retain the commission. It was said that one claim was liquid, while the other, the claim for the commission, was illiquid. This would have been of importance in a question of compensation, but had no application to a question of retention, where the only question was, whether the debt, in respect of which retention was claimed, was due. It was said that this was not the kind of claim to which retention was applicable, and that it was claimed on a transaction distinct and separate from that in which it was incurred. But a factor had by law a lien for his general balance; the meaning of which was, that for the balance arising on his general account, including as an item his commission, the factor possessed a right of retention or lien over all goods and effects of his principal coming into his possession as factor. It had never been disputed that to this effect a factor possessed a right of retention. The consignment of the beans was not in any proper sense a separate transaction—the former account had never been settled or closed, and it was always admitted that the commission was due upon it.

The lord ordinary pronounced the following interlocutor:—"In respect of the terms under which the beans in question were consigned to the defenders, and of the nature of the claim set up by them for commission for a previous consignment of oats, which claim was disputed by the pursuers,—Finds that there is no claim of retention or compensation for the said disputed claim of commission on the oats as against the proceeds of the beans, the amount of which forms a liquid and undoubted debt against the defenders, and therefore repels the defences, and de-

cerns in terms of the conclusions of the libel: Finds the pursuer entitled to expenses."

Gibson and Clark Reclaimed.

**LORD JUSTICE-CLERK.**—The point raised by this reclaiming \*note is of very great general importance, and it is very material [\*373] that the judgment should be placed on a clear, as well as a sound ground.

The plea of the defenders is founded on an alleged right of retention, and that right of retention is said to arise out of their employment by the pursuer as factors for him in the purchase and sale of goods. It is not a right of retention founded on general grounds, but is said to be that which is competent to a factor as to goods or money coming into his possession in his character of factor. I think it is justly said, in a recent case in the first division, that until the case of *Hastie v. Melrose*, the Scotch law of retention had been of late rather overlooked. And in that case of *Hastie*, as well as in others, I have expressed my great regret, that while we have in our law certain very broad and general principles applicable to retention, parties, and sometimes judicial opinions, have resorted to English law, and attempted to import rules and distinctions derived, or said to be derived, (for we can have no certainty as to such deduction,) from their law of lien, which in many important particulars, arising out of differences between the laws of the two countries as to the contracts of sale and location, has little analogy to our law of retention.

Retention is a most valuable principle in the law of Scotland, and is of plain and easy application, and most useful and equitable in operation.

The principle is well explained by *Erskine*, and is fully brought out by the case of *Sturgeon v. McLellan*, 20th February, 1813, and of *Hastie v. Melrose*.

In his *Principles*, *Bell* has an important passage, which is of importance in reference to this case and the interlocutor. (Reads sect. 1411, 4th edition.) That the debt is illiquid, therefore, is in itself no answer to the plea of a right of retention, and this disposes of one ground of the interlocutor under review. The state of the debt may, no doubt, be such as to call upon the court to interfere, if there shall be great delay or difficulty, whether by requiring consignation or otherwise. But that is a different matter.

Then, if the right of retention arises out of transactions falling under a certain employment, or relation in which the \*parties, or one of them, stand to each other, the character of such employment, [\*374] while it renders in certain circumstances the right of retention absolute, may yet regulate and limit the extent of retention, and the exact circumstances in which it is competent. Between two merchants engaged in general mercantile dealings with each other, in which claims arise *hinc inde*, the right is as general as their dealings. If, again, one is employed as factor, and his alleged right or counter claim, for which he claims retention, arises out of that character, he must be able to show

that the moneys over which he claims the right, come into his hands in that character, and he shall not be allowed to bring forward a claim, arising out of such employment, against goods, or the price thereof, coming accidentally into his hands in another way, or without previous consent of his principal—at least that is the general rule. Whether the right is liable to any exception, need not be considered. Thus Mr. Bell, in a very valuable passage, in which I should wish the occasional use of the term lien had been avoided, lays down the principle thus, under the head Factor's Retention, sect. 1455—(reads.) Then, in another passage, sect. 1448, he says expressly, that the factor's right of retention applies distinctly to a claim for commission. Now, as the right applies to moneys coming into his hands, and applies to a claim for commission, that can only refer to commission on a former sale. I do not know that one can state the principle in terms which can be more comprehensive than those employed by Mr. Bell. They cover all claims, of whatever kind, arising out of former transactions included within the scope of the factor's engagements and actings, and give the right to retain against all goods or moneys coming into his hands as factor,—that is, of course, after the counter claim which gives rise to the right of retention has emerged. Hence it is vain, as the pursuer attempted, to allege, that if one transaction is closed, except as to one disputed claim, before the next goods are sent to the factor, that against the price of the next parcel of goods the right of retention cannot arise, merely because there was a short interval between the one and the other transaction. It is, in truth, only in such a case that the right of retention comes into operation. If it [375] applied only as to the settlement of the \*balance due on each transaction, and was excluded by the remittance of the full price of the sale of one parcel of goods, and could not operate against the next parcel, there would be an end altogether of our law as to a factor's general right of retention, for then each transaction must be settled and balanced off by itself. But this is not so.

When a balance, no matter, as Mr. Bell says, from what cause, remains due to the factor, though, in full reliance on the consigner, he may have remitted the whole price of his last sales, the right of retention for that balance attaches to all goods, or moneys from the sale of goods, coming into his hands as factor: "Coming into his hands as factor,"—of course that means, after the balance claimable by the factor has arisen, and after the goods in respect of which the balance is claimed have passed, or the price of them, out of his hands. Thus the operation of the principle as to retention is really applicable only in the very case in which the argument for the pursuer would exclude it, viz., to secure a balance arising out of the disposal of goods the price of which has been all remitted, and which is therefore to be secured against and out of the price of other goods coming into the factor's hands.

Such, then, being the principle, this case is free from difficulty.

On the large transaction as to the oats, a commission was due. That is admitted. It is not pretended that the claim for commission was abandoned or waived. It is admitted that it continued good and effectual



as an unsettled item or balance on the accounts of factor and consignor, although there was a dispute as to the amount of commission legally claimable, owing to the change of circumstances.

Hence the factor had a claim for an unsettled balance. To say that the factor, relying on the continuance of transactions, had sent the oats purchased for the pursuer to be sold by him, and from thence to say that the factor's lien, as it was termed, was abandoned, is to mistake entirely the character of the right of retention, which has no analogy to a special lien on the goods of another, for labour and skill, or outlay on these particular goods. If the factor's right were to be so considered, a general right of retention for any former transaction against \*goods coming into his possession, he never could have, if he has remitted the [\*376] whole price of that sale,—and yet the right is given really in order to apply to, and enforce the claim against, other goods subsequently coming into the factor's hands. Well, then, at the time the oats are sent to the pursuer to see whether he can sell them, and before they are sent, communings begin as to the defenders, the factors, selling Emden beans for the pursuer. Though the letters are coincident with the oats being sent to him, and though they refer to prior personal communings, yet it happens that the beans, although expected long before, and announced, do not arrive at Leith, and are not sent to Glasgow for nearly three months thereafter. The pursuer knew that he still owed his factors a balance on his account, though the amount was unsettled.

When the beans were sent to them, as his factors, for sale, he might have stipulated that the price of the goods was to be remitted to him without any claim for what he owed them. And if he had made such a stipulation, and if they had accepted such a restricted commission, and acted on it, they might have been barred from bringing forward this claim of retention against the price of the beans. But the beans are not sent to them on such a footing. Not many additional words might have perhaps raised the case, that they were bound either to refuse to act on the new commission to them as factors, or at least to apprise him of the condition under which they held it must be subject. But taking the terms as we find them, of the letters, and all additional proof being renounced, there is nothing in the correspondence to bar the claim of retention for the sum, whatever it may be, confessedly due to the defender, against the price of the goods coming into their hands as factors, for sale, in continuance of the transactions between the parties.

When there are broad general principles of mercantile law applicable to the relation and transactions of parties, I apprehend that it tends to unsettle all clear rules of adjustment of rights, to attempt, without express stipulation, to find out, on nice and doubtful construction of particular letters, that the right previously existing in the factor had been waived and given up by him. This is really the condition to which the case is brought on principle. The pursuer must show that the \*factor, who had still an unsettled balance, had given up, or, by acquiescence, was barred from stating, his right of retention against the price of the goods afterwards sent to him, as factor, to be sold. This, I think, is

the state of the question. And the pursuer has failed, in my opinion, to establish this necessary condition of his reply to the defender's plea.

That the amount of the defender's claim is unsettled, it has been admitted, does not exclude the right of retention; and the principle stated by Bell is very important in reference to that part of the case. Well then, if the claim, not having been liquid, as it is called—that is, not settled as to amount—is no objection to the defender's claim of retention, there is, in reality, no other point left in the case.

I have only to add, that it is very plain that the case, as argued before the lord ordinary, was made to turn on the questions which may arise as to a factor's claim on the bankruptcy of the consigner. Of course we need not consider whether the defender's claim would in this case have been excluded by the supervening bankruptcy of the consigner. But clear it is, that the view urged upon us, of separating each transaction between consigner and factor, is one which can be competently entertained only on the bankruptcy of the consigner, supposing it even then to raise any obstacle to the factor's claim. I am therefore for altering the interlocutor of the lord ordinary, satisfied that the view presented to him is one which could only arise on the bankruptcy of the consigner, and that the proper principles of the law of Scotland as to retention have been overlooked.

This belongs to a class of cases arising out of mercantile transactions in certain very common and important relations taking place in the business of the mercantile world, in which it is most important to proceed on general principles, if we find any in the law which governs the case, and to disregard unsubstantial distinctions and critical commentaries on the correspondence of parties, which admittedly do not profess to dispose of the point in question. We have a clear principle applicable to this case, and I find no facts which can exclude its application.

[\*378] \*Lord COCKBURN.—I am of the same opinion. The whole case is settled when we get possession of the legal rule;—that is, that a factor has a right of retention not only on each individual transaction, but that he is entitled to retain on subsequent consignments, in payment of prior unsettled transactions. This is the rule, and it is a very sensible one, and well adapted to regulate ordinary mercantile transactions—always excluding the cases of bankruptcy, and of special agreements. The retention of a factor covers his right to commission, not only on the goods in his hands, but on prior consignments, unless some special agreement can be shown as to the way in which he was to account for the goods, which would have the effect of preventing his retaining his commission, or the two transactions were separated by such a distance in point of time as to show an abandonment of it. On these grounds, which your lordship has expressed so clearly, I concur.

Lord MURRAY.—There are two points to be attended to in this case—one of fact and the other of law. First, was there here a continuous series of dealings between these parties? It is said that there was a chasm in their correspondence which separated the transaction of the oats from the consignment of the beans. It does not, however, appear

that this was the case; nor is it necessary that there should be continuous sales every week or every month. It is a clear rule, that where a party acts as factor for a commercial house, he has a right of retention for his balance, over what comes into his hands in that capacity. This has been the case since Lord Stair's time, and I should be sorry to throw any doubt upon it.

Lord WOOD.—The parties to this action were engaged in a course of transactions as consigner and as factor. It was agreed between them, in reference to this transaction, that there was to be only one commission on purchase and sale, and a dispute arose between them as to what the amount of it was to be. The factor parts with possession of the goods in fulfilment of the instructions of his consigner. Did he not possess a right of retention, the factor would be left to his ordinary remedy of an action for his commission. Immediately after, \*the parties begin to correspond about a new transaction, and a consignment of beans [\*379] comes into the hands of Gibson and Clark, in their capacity of factors. From the proceeds of these beans they retain their commission. It is admitted that some commission was due,—we have nothing, however, to do with the amount just now. All that we have to consider is, whether Gibson and Clark were entitled to retain their commission from the price of the beans. In his statements in the record (Art. 3,) the pursuer sets forth that the beans were forwarded to the defenders on the understanding that immediately on the sale they should remit the price realized, under deduction of the charges. At one time I had some difficulty on this point, but I have come to be of opinion that the pursuer had not made his meaning sufficiently clear to the defenders, if he intended that they were not to deduct their commission on the oats from the proceeds of the beans. The law that must regulate this question is laid down very clearly by Mr. Bell. It is of no consequence that the claim in respect of which retention is sought is illiquid, and the transaction may be perfectly separate; the fact to be looked to is, that the factor parts with the goods in his possession, in reliance on his right of retention over any balance that may remain in his hands. There is nothing to take the case out of the ordinary rules as to a factor's retention.

The court pronounced the following interlocutor:—“Having heard parties' procurators, who respectively at the bar renounced further probation in the cause,—Alter the interlocutor of the lord ordinary: Find that the defenders, employed as factors by the pursuer, had a right of retention against the proceeds of the beans sent to them by the pursuer to be sold for him by them as factors, and which price they received by the sale thereof, for and on account of their claim for commission on the preceding transaction in which they purchased a quantity of oats for him, as factors, and which commission was unsettled at the time when the pursuer sent to them the said beans for sale: Find that the pursuer has failed to prove that there was any agreement or understanding at the time when the beans were so sent to the defenders for sale, that [\*380] the price thereof should \*be remitted free of any claim for commission on the preceding transaction, and that the defenders were to be

only bound to make the same good in an action *contraria*, in respect of the preceding transaction : Therefore sustain the defenders' right of retention in respect of said commission due to them as factors, against the price of the beans subsequently coming into their hands as factors employed by the pursuer : Of consent of parties, before farther answer, remit to Mr. James Grindlay Cowan, to report on the amount of the commission due to the defenders in the circumstances of the case, as disclosed by the correspondence."

## PARTNERSHIP.

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IN THE ABSENCE OF EXPRESS STIPULATIONS BETWEEN PARTNERS AS TO THEIR RESPECTIVE SHARES IN THE PROFIT AND LOSS OF THE BUSINESS OF THE CO-PARTNERY, THERE IS NO PRESUMPTION IN LAW THAT THE SHARES OF THE PARTNERS ARE EQUAL; AND THE AMOUNT OF THEIR SEVERAL SHARES IS A QUESTION OF FACT TO BE DETERMINED BY A CONSIDERATION OF THE WHOLE CIRCUMSTANCES RELATING TO THE PARTICULAR PARTNERSHIP; BUT IN THE ABSENCE OF ALL CONTROLLING CIRCUMSTANCES, EQUALITY WILL THEN BE PRESUMED TO HAVE BEEN THE INTENTION OF THE PARTNERS.

### I.—PEACOCK v. PEACOCK.

March 4, 1809.—E. 2 Camp. R. 45.

THIS was an issue out of chancery, to try whether the plaintiff was beneficially a partner with the defendant during the last five years, and if he was, for what share not exceeding one moiety of the profits?

The defendant is a law stationer, who has for many years carried on that business to a great extent in Chancery Lane. The plaintiff is his son, and was bred up by him in the same business. In March, 1803, the plaintiff came of age, when his father said to him, "You shall have 15s. a week till October; the books will then be made up, and you shall have *a share*; we need not talk of the share till October comes; we shall settle it then." Soon after, he told his apprentices, that his son being now of age, would be as much their master as himself. When the 1st of October arrived, he changed the firm, wrote Peacocks over his door, opened a new set of books, and \*from that time, [\*382] in every possible way, represented his son as his co-partner. The latter likewise acted in all respects as a partner, and applied to business with assiduity and steadiness. But no settlement ever took place as to what share the son should have. Till 1806, he continued to take only 15s a week from the receipts. The defendant then said, that from not keeping regular accounts, he did not know what his profits were, and could not

ascertain the share his son should have; but that till some arrangement was formed, his son should take £1 a week, and he himself should take £8 a week, out of which he was to defray the expenses of the establishment. They went on nearly on this footing till within a few months back; when a quarrel taking place, the father turned the son out of doors, and took in another partner, giving him a third of his business. The son then filed a bill in chancery against the father as his co-partner, for a discovery and to account. The father in his answer denied the existence of the partnership; whereupon this issue was directed.

*Park* for the plaintiff contended that he was clearly a partner with his father, and that as the share to which he was entitled was left indefinite, the law must presume it to be a *moiety*.

The *Attorney-General* contra, insisted, that although there was a partnership as between them and the rest of the world, yet as no terms of partnership were ever agreed upon, *inter se*, the son was merely his father's servant, and entitled as such to a compensation for his work and labour.

LORD ELLENBOROUGH.—“The fiftieth part of the evidence adduced would have been sufficient to establish a partnership as between these parties and the rest of the world. This being established, the presumption of law is, that they are partners *inter se*. Such presumption might have been repelled. A man who renders himself liable to third persons as a partner, may, in truth, be the mere agent or servant of his supposed co-partner, and entitled only to fixed wages. But in the present case, the presumption of law, instead of being repelled, is confirmed. The [\*383] \*defendant evidently gave his son a beneficial interest in his business, leaving the amount to be settled when the books should be balanced. There is no pretence, however, for saying, that the plaintiff is entitled to a *moiety* of the profits; and the jury must consider what is a fair and just proportion for the father to give, and the son to expect, after what has passed between them.”

The jury found that, since October 1, 1803, the plaintiffs had been entitled to a *fourth* part of the profits of the partnership trade.

## \*II.—CAMPBELL'S TRUSTEES v. THOMSON.

March 26, 1829.—S. 7 S. 650. House of Lords, Feb. 14, 1831. 5 W. & S. 16.

THE late Archibald Campbell, writer to the Signet, after serving an apprenticeship of five years, entered, in 1798, into the office of the defender, Mr. Thomson, as a clerk. He remained in that situation till 1813, when he became a partner with Mr. Thomson. By the pursuers it was alleged, that he was admitted as such in January, while Mr. Thomson stated that he was not so till April. Mr. Campbell did not contribute any capital; but it was alleged that he was possessed of superior qualifications as a man of business; that he was one of Mr. Thomson's nearest relations; and that that gentleman had arrived at an

age when he had become desirous to be relieved from the fatigues of business. In admitting that Mr. Campbell had become a partner in April, 1813, Mr. Thomson at the same time alleged that his share was limited to one-third of the profits; but there was no written contract, and there was no evidence in the books or otherwise to show that such was the agreement or understanding of parties. Mr. Campbell died in 1823, having left a trust-deed in favour of the pursuers, who brought an action against Mr. Thomson, concluding against him, first, for payment of certain alleged arrears of salary due to Mr. Campbell, as a clerk, from 1798 to 1813; and, secondly, to account to them for one-half of the profits from 1813 till the death of Mr. Campbell in 1823. Mr. Thomson denied that there were any such arrears, or that he was liable to account [\*384] \*for more than one-third of the profits. The main question, therefore, came to be, whether the pursuers were entitled to demand one-half of the profits, or were only entitled to one-third, agreeably to Mr. Thomson's admission?

On the part of Mr. Thomson it was contended, that there was no universal rule of law establishing a presumption of equality in partnership; that it was a question of circumstances to be decided by a jury; and that although, no doubt, the institutional writers stated that equality was to be presumed, yet this dictum rested on the supposition that the contributions had been equal. Accordingly, in the case of *Peacock v. Peacock*, a remit had been made to a jury from the Court of Chancery in England, to ascertain the extent of a partner's share, where there had been no equality of contribution; and Lord Ellenborough told the jury, that they were to take into consideration all the circumstances, and say what was a just and fair proportion; and the jury, on a view of the whole circumstances, had found a fourth. The same rule had also been acted on by the second division, in the recent case of *Russell v. Anderson*. In the present case, however, there had been no equality in contribution.—Mr. Thomson being possessed of a long established and valuable business—of skill and experience equal at least to that of Mr. Campbell; and although that gentleman, no doubt, contributed professional skill and industry, yet he did not advance any capital, nor bring any addition to the business, and therefore it was impossible to presume equality; consequently, the pursuers were not entitled to an accounting for more than one-third.

On the other hand, it was maintained by the pursuers, that in the absence of any written evidence to establish the extent of a partner's share, the presumption by the law of Scotland was equality; and that the same appeared to be the law of England from the doctrine laid down by Lord Eldon in the case of *Peacock*, when the verdict came to be applied, on which occasion his lordship had observed, that the result of the issue appeared to him to be extraordinary, because, "as no distinct share was ascertained by force of any express contract between [\*385] \*them (the partners,) they must, of necessity, be equal partners, if partners in anything;" that the case of *Russell* had been decided on a specialty, it having been shown from the books that the parties had settled on the footing, first of one-sixth, and latterly of one-third; but

that the general rule had been recognised in the case of *McWhirter v. Guthrie*; and that although it was true that Mr. Campbell advanced no capital, yet, in a business of the nature in question, he contributed what was more valuable, superior professional qualities, and relieved Mr. Thomson of the irksome details of the business; and, besides, he had allowed his share of profits to remain in Mr. Thomson's hands, so that even in this view he might be considered as having contributed capital.

The lord ordinary at first remitted the case with certain findings to the Jury Court, December 9, 1828, 7 S. 150; but the pursuers having reclaimed, and the court having some doubts of the competency of the interlocutor, recalled it of consent, and remitted to his lordship to reconsider whether the case should be remitted to the Jury Court, or reported to them upon cases. When the cause came before his lordship, he reported it on cases, "deeming it of material importance that the different points of the cause should be determined by the lords."

On the cause coming to be advised,

Lord BALGRAY observed.—"That if it were necessary to ascertain whether there were arrears of salary, and the amount of them, it might be proper to remit to the Jury Court, but that he was disposed to think that it must be held that they were abandoned by Mr. Campbell when he was admitted as a partner; and the question therefore came to be, seeing that there was no evidence on the subject, what was the rule or the presumption of law as to the amount of the share? In mercantile companies, the extent of capital contributed by each of the partners may be of much importance in fixing the share; but there is a distinction in regard to professions, where mental qualifications, and not capital, are of [\*386] the chief importance. In \*this latter case, it is natural to presume equality; and this is in accordance with the general rule of law. Mr. Campbell's share must therefore be held to have been one-half."

LORD PRESIDENT.—"If it had not been for the case of *Peacock*, and the opinion of Lord Ellenborough, no difficulty would have existed in my mind, because, according to the law of Scotland, the presumption is for equality. It is immaterial that no capital was contributed, because a person's mind and exertions may be more valuable than capital."

Lord CRAIGIE thought "that it was impossible in all cases to presume equality, and therefore was for a remit to the Jury Court to ascertain the fact."

Lord GILLIES.—"Although there are certainly two questions—one relative to the clerkship, and another to the partnership, yet they are intimately connected, and ought not to be considered separately. The equitable view is, that on being admitted a partner, Mr. Campbell abandoned all claim for any sums which might be due to him for his services as a clerk; and that this was one of the considerations operating on Mr. Thomson's mind in admitting him a partner. The fact of partnership being admitted, the question comes to be, what is the extent of the share held by each of the partners? By the law of Scotland, the presumption is for equality; and such appears to be the rule in England, from the opinion delivered by Lord Eldon in the case of *Peacock*. A different



rule, no doubt, is said to have been laid down by Lord Ellenborough; but my opinion coincides with that of Lord Eldon. But suppose the case were sent to a jury, the result must be a verdict finding equality, because there is confessedly no evidence as to the extent of the share; and, in the absence of evidence, it is the duty of the judge to tell the jury that they must find equality, so that a remit to the Jury Court is superfluous."

LORD PRESIDENT.—"Whatever may be the rule of the law of England, I am clear that, according to the law of Scotland, the rule is equality."

\*The court accordingly "found, that it is established by written evidence, that a co-partnery was entered into in January, [\*387] 1813, in respect of which all previous claims on the part of Mr. Campbell must be presumed to have been passed from and discharged; further, that the presumption of law is, that there was to be an equal participation in the profits of the business between the two partners; and *quoad ultra*, remitted to the lord ordinary to proceed as should be just."

The defender appealed to the house of lords.

*Argued for the Appellant.*—The court below have misapprehended the rule laid down by the institutional writers. That rule is, not that there shall be an equal participation of profits, but that the profits shall be divided on a principle of equality, having reference to the amount of the stock contributed. Thus, if one partner shall contribute two-thirds, and another a third, and there is no stipulation as to the proportion in which the profits are to be divided, the law does not presume that they shall be equally divided—that is, that each partner shall receive one-half, but that they shall be divided on the principle of equality, meaning that the one shall get two-thirds, and the other one-third. But where the parties are at issue as to the value of the amount of the stock contributed, the question must be submitted to a jury, who will take all the circumstances into consideration, arising either from the relative position of the partners, their comparative skill, experience, means of enlarging the business, and the probabilities of the one succeeding to the other, and will arrive at the result as to what is the true contribution of stock, whether consisting of capital, money, clients, &c., and from that be able to fix the proportion of the profits which ought to be drawn by each of them. This was the course followed in the English case of *Peacock v. Peacock*, which is in accordance with the doctrines of *Stair* and *Erskine*, and the decision of the Court of Session in the case of *Anderson v. Russell*. But the court below, proceeding on a misapprehension of the word equality, have found, from the mere fact of partnership, that there must be an equal participation of profits; and this they did without taking \*any evidence as to the comparative value of the stock [\*388] contributed.

2. In regard to the cross-appeal, the appellant was always ready to go into an inquiry as to the matter of fact, whether all claims by Campbell as clerk had not been settled; but on this there was satisfactory evidence before the court.

*Argued for Respondents.*—Where there is no special contract between

partners fixing the rate at which the profits are to be divided, the established rule of the law of Scotland is, that they shall be equally divided. It is so laid down by Lord Stair and by Erskine, and was so decided in the cases of Brock and M'Whirter; and in England was recognized by Lord Eldon in the case of Peacock.

2. Although the respondents were willing to have acquiesced in the judgment of the court below relative to Campbell's claims as a clerk, yet, in order to keep the question open, they have appealed, on the ground that the decision was pronounced without any evidence, and merely on the supposition that, because Campbell was admitted a partner in January, 1813, it was probable he would renounce all previous existing claims.

This was a gratuitous assumption not warranted by the facts.

Lord WYNFORD.—“My lords, it appears to me that the cases to which counsel have referred are decisive of that now under your lordships' consideration. The judgment of the Court of King's Bench, in the case of Peacock v. Peacock, does not seem to me to be at all affected by the decision of my Lord Eldon in the Court of Chancery. I have looked, also, to another authority, greater than that of the noble lords I have mentioned. In questions of Scotch law, the opinions of Scotch lawyers ought to prevail over that of the highest legal authorities in this country. The opinion of my Lord Stair is directly opposed to that of the Court of Session. The question, my lords, is, Whether, when there is no agreement as to any specific share of partnership property, the court is bound, upon a presumption of law, to say that the profit and loss must be divided into equal shares? In the court below, the lord [\*389] ordinary had decided that it ought to be sent to a jury, to \*consider, under all the circumstances of the case, what the proportion should be. The Court of Session, however, considered the decision of the lord ordinary incorrect, and took upon themselves to declare that it must be taken as a clear principle of law, that where there is no express contract fixing the rights of the parties, the partnership property and the partnership profits must be equally divided. My lords, I cannot help thinking, that if that were the law, it would be highly fit that it should be well understood, in order that the consequences of that legal presumption might be guarded against; the application of such a principle will prevent many partnerships, which are beneficial to both parties, and especially to the party who takes the smaller share, from being formed. What person who is in the possession of an established business, and of good-will of that business, would take a clerk into partnership with him, if, by the mere effect of taking him into partnership, he was to confer upon such clerk an equal share of all the profits, and a portion of the good-will which he had acquired, and which he might sell for a valuable consideration? Such a law must prevent young men from being advanced from the situation of clerks to the more respectable and more permanent situation of partners. My lords, whatever the convenience and inconvenience of the rule may be, if the law is so settled, your lordships, sitting judicially, must decide according to it. I cannot, however, think that it is so settled; the contrary appears to be clearly the

understanding of Lord Stair. Lord Stair says, 'Society,' that is partnership, 'may be described a contract for communicating the profit or loss of that which is brought into the society proportionably, according to the share and interest of each partner;' so that if they have different shares or interests, a division according to the proportion of partnership in each share or interest must be made. 'It is true,' says that learned writer, 'that if there appear no inequality in the stock of the partners, when no proportion is expressed, equal share of profit and loss are understood.' He was writing before there was a jury court in Scotland, when the judges were called upon to decide the question of law and fact; and I take Lord Stair to say nothing more than that which I ventured to intimate to your lordships a long time ago \*as my opinion, [\*390] that if I were to direct a jury, or were I sitting in a situation to exercise an opinion, both upon the law and the fact, I should say, 'If there be no evidence to guide my judgment, I will make the division equal; I will look at the circumstances, and I will infer from the circumstances the intention of the parties; but if there is no circumstance inducing the court to give more to one than to the other, then the shares should be equal.' But let us see what Lord Stair says further: 'Or if the skill or industry of some of the partners be of great importance, the society may consist in these terms,—that those persons shall have no share of the loss, and shall have such a share of the profit, according to the sentence of Sulpitius; but if such inequality of industry, &c., appear not'—that is, if no such circumstance appear,—'the sentence of Mucius rejecting such inequality of shares is just, and there is no contrariety between the opinions of both.' If the circumstances of both parties are the same, their shares are to be equal. If one brings more capital, or if one was in possession of a business to which he admits the other to a participation, it is to be considered whether these advantages do not entitle him to a larger share of the profits of the concern. Now, in this very case, a man in an established business takes a young man into partnership; the good-will which the first partner has is a marketable article, as much as any part of the stock in trade. Does not that advantage create an inequality? Again, it is fair to presume that he who has been in the business a long time has more knowledge of the business than the young man just admitted into the concern. There were those circumstances, therefore, to be considered by the court, in deciding whether the share should be equal or unequal; and I cannot help thinking it would be gross injustice if, in such a case, the question of the amount of share be not sent to a jury. Your lordships cannot take upon yourselves to settle the proportion of the parties. I think, with humble deference, that if you did, your lordships would be assuming a duty you are unequal to the discharge of. Perhaps I have had as much experience in these matters as most of your lordships; but I profess myself totally incompetent to settle such a question. The fittest persons to decide a case of this sort are a jury of \*merchants. The case of *Brock v. Brown* is referred to; but that case does not appear to me to affect this ques- [\*391] tion. The Court of Session did not decide that they would not give unequal shares; all that was decided in that case was, they could not allow

one of the partners to claim for labour performed. I think the court were perfectly right in that decision; for the moment a partnership is established, there is an end of any implied contract for service, and the parties could be considered only as partners, and not as master and servant. The opinion of Lord Stair is supported by the judgment of Lord Ellenborough, which is expressly in point upon the present occasion. It is supposed Lord Eldon's opinion differs from that of Lord Ellenborough. If it had appeared to me that there was ground for that supposition, I should have thought that this case ought not to be decided till we had an opportunity of consulting Lord Eldon; but I think that it is not the case. Lord Eldon must have thought that a different proportion might be given, or his lordship would not have directed an issue to ascertain the amount of the shares of the parties. His lordship must be taken to have held that the jury were to decide upon the quantum. When the case came back, his lordship was surprised at the quantum found by the jury. What led the noble lord to express that surprise I do not know. It cannot be taken from hence, I think, that he thought that the jury had nothing to do with the quantum at all, but merely that the apportionment which they found was not a just one. Under these circumstances, my lords, unless my noble and learned friend on the woolsack should differ with me, I should humbly move your lordships that this interlocutor be reversed, and that the matter be sent back to the Court of Session, with a direction to send an issue to the jury court to ascertain, under all the circumstances of the case, what is the fair proportion of this business to which this party was entitled."

Lord Chancellor BROUGHAM.—"My lords, I so entirely agree in the view which the noble lord has just taken of this case, that I should not have troubled you with a single observation, further than doing myself the honour of seconding his \*proposition, had this not been [\*392] a case where the opinion of your lordships does not go to affirm the judgment; and your lordships are aware that in such circumstances it is generally deemed fit, for the satisfaction of the parties, and out of respect to the court below, to assign reasons for the reversal. I shall therefore shortly follow my noble and learned friend in stating my view of the case. My lords, the point to which I wish to call the attention of the house is this: It is said to be the presumption of law, that where there is a partnership, there is to be an equal participation in the profits of the business. Now, my lords, for this, as a presumption of law, it is correctly stated by my noble and learned friend, that there exists no ground. If it had been put as a presumption of fact, I could have better understood the statement. If I were trying at *Nisi Prius* the question, what proportion the partners in a concern were severally entitled to,—that being the question of fact sent to a jury by Lord Eldon in *Peacock v. Peacock*, and tried afterwards by Lord Ellenborough,—I should be disposed to advise the jury, that the matter of equal division would be a convenient doctrine of fact, and form the ground for a convenient inference to be drawn in the absence of other evidence; but that would be only supposing there was no other evidence in the cause—that would be supposing, above all, that if there was any other evidence which could

be found to alter the proportions, that evidence must furnish the rule ; and that would be an additional ground for saying, that it must be a presumption of fact, and not of law ; but here the court confound, as it appears to me, the presumption of fact and the presumption of law, and make that a presumption of law which, if admitted, excludes all question of fact ; *cadit questio* as to the fact the moment you allow that, in the absence of a written contract, the law holds the shares to be equal. My lords, this is a proposition as to which I think the court have been misled by a case which does not appear to have been very explicitly stated, and which does not seem to have excited very great attention. Their doctrine goes this length, that whatever the circumstances,—taking, for instance, the case of a banker's clerk who is admitted into the house,—unless there be a special contract to exclude the legal presumption, the legal \*presumption shall give him an equal share of the profits, [\*393] and shall exclude all evidence of the fact, and all consideration of the particular circumstances of each case. To that doctrine, which this interlocutor has embodied, I cannot, any more than my noble friend, accede in point of law. My noble and learned friend, if he was sitting at Nisi Prius directing a jury, would very probably take that for the ground of his direction, as being the convenient division, in the total absence of other evidence to break in upon it. It is, certainly, the line I should adopt in dealing with the question of fact ; and having taken the opportunity afforded by one of the learned chief justices sitting near us, as the argument proceeded, I find that he has no doubt upon this subject. When a case appears so clear, which has been otherwise decided below, a person doubts sometimes whether he is not taking too confident a view of the case ; and I wished to know whether the opinion and judgment of that learned judge confirmed my own ; and I have received an intimation, that his clear opinion is precisely the same as that stated by my noble and learned friend, and to which I entirely accede, that where there is no evidence—not shutting out evidence, but where there is none—he should in all cases direct a jury to take into consideration the fairness of an equal division, but not discountenancing evidence—rather courting evidence—rather regretting that there was no evidence—and only having recourse to that presumption in the last resort, for want of evidence. This is not the doctrine of the court below ; for they say, we do not court evidence—we, on the contrary, rather shut it out ; for we conceive we are bound to give effect to this, as a legal presumption to overrule it. My lords, it is more satisfactory, in deciding on appeals from the Scotch courts, where it can be done, to refer to cases in the courts of Scotland than in those of England. Nevertheless, the greatest deference is due to the authority of English courts, whether of common law or of equity, in mercantile questions ; because our law in that, purports to proceed on the same principles as theirs ; and I should with difficulty attempt to select any one chapter of the Scotch mercantile law which differs in its principle, or is intended to differ in its principle, though there may be in some respects a difference in its details, from the law of \*England. Undoubtedly, if the cases in the Scotch courts had been founded on different principles, and running in [\*394]

an opposite direction to ours, we should have been bound to prefer their authority ; but there appears to be no distinction. I will first say a word with respect to the authority of the civil law, for I see that is adverted to in some of the text writers. I deny that the civil law is of direct authority in the Scotch, any more than it is in the English common law. Much respect is due to the wisdom of the makers of and the practisers under that venerable system of jurisprudence, recommended by its great antiquity, by the number of ages during which it existed, by the numberless millions of people whose various concerns it regulated during those ages, and, above all, by its beautiful symmetry, by its unexampled precision and fulness, by the consistency in principle with themselves of all the arrangements of that code ; nevertheless, it has no direct weight as an authority in the courts either of Scotch or English law, whatever deference it may claim as a monument of the wisdom of old times, and the ability of learned men. But if there is any one department in which the authority of the civil law shall not be taken to rule points in our day, it is that of mercantile jurisprudence, where the defective nature of ancient commercial dealings and commercial institutions connected with them, and growing out of them, necessarily makes that code of far less weight than in other cases. I deny not that the rule laid down in this interlocutor was the rule of the civil law—it may be taken to have been so ; and that, in order to exclude the equality of shares of profits, it was requisite that there should be an express stipulation, in the absence of which an equal division was held to be the presumption—I may say the presumption of law—not to the extent of excluding an express contract, but to the extent stated in this interlocutor. But I not only deny the authority of the civil law as a direct authority, I deny the weight of it, the general deference to it, in a question of mercantile law, in mercantile times, and in a mercantile country. Then the authorities of the English law are the other way. Permit me to observe, that as to questions of partnership, though one court in this country has peculiarly the cognizance of these—namely, the court of equity—inasmuch as at law partners are [\*395] \*considered as one and the same person, yet when that difficulty is got over by sending an issue to trial, the question of the shares of the partners came with peculiar advantage under the cognizance of a learned judge like Lord Ellenborough, and a jury of merchants in the city of London, than which judge no one had ever greater experience in mercantile law, and than which juries no men are better enabled to decide on such matters by their judicial experience, as well as by their mercantile habits. It appears in the report of the case of *Peacock v. Peacock*, that Lord Ellenborough entertained no doubt whatever ; he excluded at once the idea of equal division, and directed the jury to take all the circumstances into their account ; who found one-fourth on the grounds stated and the facts proved, to be the proper division. And it is not Lord Ellenborough's decision alone on which I proceed here, but Lord Eldon's, for he sent the very question to a jury ; but if he had held that there was, in the absence of a written contract, a presumption of law in favour of equality, it would have been fruitless to have done more than send the question : Are A. and B. partners ? for the first

branch of the issue ; and then for the second : Is there anything in their connection with each other to alter by special contract the presumption of law in the absence of an express agreement ? These would have been the questions Lord Eldon would have sent to the jury ; and when the record came back, instead of merely making an observation in disparagement of the verdict—for it amounted to no more—he would at once have said they had determined a question he had never sent to them ; but if he had said so, it would have been in disparagement of his own order in directing the issue, for he had directed them to inquire what was the share and amount ; and all he appears to have said on the matter afterwards coming before him was : ‘ I do not exactly see on what ground the jury came to that conclusion.’ If his lordship had known as much as my noble and learned friend, or as Lord Ellenborough, of what passes in Guildhall, he would not have expressed his surprise ; for it is not uncommon in London that the fourth part should be the proportion in the case of father and son. There was no new trial directed by Lord Eldon. It is said the party acquiesced in it, and therefore he was satisfied ; \*but it appears [\*396] that it was only as to the question of fact, the exact proportion of one-fourth, that Lord Eldon felt a doubt, not seeing how that was established. But if he had not intended to send that to the jury as a question of fact, as it appears to me, Lord Eldon would have set it right when it came before him. Now, my lords, such being the only matter laid before us with respect to English law, how stands the Scotch law, as it appears from cases, or the authority of text writers ? Lord Stair has been alluded to—the high authority of Lord Stair—by my noble and learned friend. Erskine’s is nothing in derogation of that authority, when accurately viewed. Lord Bankton’s is an express affirmation of it ; and then your lordships have the case which has been cited here, and to the accuracy of that report I hear no objection urged on the other side of the bar—the case of *Russell v. Anderson*. There you find the learned judge is dealing with this very proposition. He does not accede to the proposition of law as a general one, for he considers it to apply only to the case of parties associating on equal terms, both in stock and labour. In point of law, the party founds his plea on the equal rights of partners, from which he derives those funds, that if there be not indisputable evidence of a different arrangement, equal rights must be presumed. What is meant by equal rights, strictly applies to the shares you have equal rights to, shares which may be equal or unequal, according to the circumstances of the case. He deals with this as the proposition. He cites Lord Stair and Lord Bankton ; he then states, that where there is room for doubt, it must be sent to the Jury Court. He then cites *Peacock v. Peacock* ; and he supposes the case of a clerk admitted as a partner into Sir William Forbes’s banking house, and holds that it could not be supposed in such a case—though for this the respondent must contend—that he would be entitled to an equal share of the profits with the heads of that house. This is an authority on all-fours, and there is no decision on the other side.

“ My lords, upon these grounds, taking it simply as a question of

Scotch law, deciding nothing further—as it ought to be our rule in no case to go further than the question before us—saying nothing at all about *Peacock v. Peacock*, except to explain \*the discrepancy [\*397] which is inaccurately supposed to have existed between the Court of Equity and the learned judge at Nisi Prius—saying nothing respecting the law, except as a question of Scotch law, established by the decision of a learned judge, established by the text writers of the greatest eminence—upon these grounds, I concur with my noble and learned friend in advising your lordships to reverse the decision, and remit the cause to the Court of Session, in order that they may send the question to the Jury Court, as they were in the course of doing, but for the impediment thrown in their way by the erroneous position laid down. But I would strongly recommend to the parties to make an arrangement themselves and take one-third, and then we shall hear no more of it, and they will save a great expense.”

The LORD ADVOCATE submitted, “that on the cross-appeal, whatever this house might do in regard to the question of partnership, they ought to decide that Mr. Campbell had waived all claims for further payment for his services as clerk when taken into partnership.”

LORD CHANCELLOR.—“This appears to be also a matter of fact proper to be submitted to a jury; both questions should be disposed of in the same way, by reversing the interlocutor so far as appealed from in the original and in the cross-appeal, and remitting the cause to the Court of Session, with an instruction to them to direct an issue or issues to be tried by a jury with regard to the whole matters in dispute between the parties.”

The House of Lords ordered and adjudged, That the interlocutors, so far as complained of, be reversed; and it is further ordered, That the cause be remitted back to the lords of session, of the first division, in Scotland, with instructions to them to direct an issue or issues to be tried by a jury, which issue or issues shall include the whole matters in dispute between the parties in this cause; or to proceed otherwise in the said cause as they shall deem just, and shall be consistent with this judgment.

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[\*398] \*1. On the return of the case of *Peacock v. Peacock* to chancery, Lord Eldon appears to have disapproved of the doctrine laid down by Lord Ellenborough in the trial of the issue. At the same time, if Lord Eldon was of opinion that the presumption of law was in favour of the shares of partners being equal, in the absence of express stipulation on the subject, it is difficult to see why his lordship remitted to a jury to determine what share of the profits of the copartnery the plaintiff had. In *Peacock v. Peacock*, 16 Ves. 56, his lordship is reported to have observed as follows:—“The father employed his son in his business, and, as is frequently done by a father, meaning to introduce his son, the business was carried on in the name ‘Peacock and Co.’ It appeared to me that the son, insisting that he had a beneficial interest, must be entitled to an equal moiety, or to nothing; that as no distinct share was ascertained by force of any express contract between them, they must of necessity be equal partners, if partners in anything. In that view, the result of the issue that was directed, appears to be extraordinary. The proposition being that the



son was interested in some share not exceeding a moiety, the jury in some way, upon the footing of *quantum meruit*, held him entitled to a quarter. I have no conception how that principle can be applied to a partnership. The parties, however, considered themselves bound by that verdict."

2. In relation to this matter, Mr. Justice Story, in a note to his Commentaries on the Law of Partnership, observes:—"In *Farrar v. Beswick*, 1 Mood. and Rob. 527, Mr. Justice Parke held the same doctrine as Lord Eldon, and said: 'Where a partnership is found to exist between persons, but no evidence is given to show in what proportions the parties are interested, it is to be presumed that they are interested in equal moieties.' It is true, that in the case of *Thompson v. Williamson*, 7 Bligh, R. 432; S. C. 5 Wils. and Shaw, 16, a doubt was thrown upon this doctrine, as a doctrine of the common law, by Lord Wynford and Lord Brougham; but I cannot think that it is successfully maintained by the reasoning contained in their opinions. Each of these learned judges admitted on that occasion, that if there is nothing to guide the judgment of the court to give unequal shares, there is no rule for them to go by but to give in equal shares. What is this but affirming, that in the absence of all controlling circumstances leading to a different conclusion, the presumption of law is, that the partners are to take in equal shares. But it is not an irresistible presumption, for where there are circumstances which demonstrate that the partners in the particular case did in fact intend, or from the general habit and custom of their trade and business, under the like circumstances, must be fairly presumed to have intended to share in a different proportion, there is not the slightest difficulty in admitting, \*that the presumption of law ought to yield to the presumption of fact, as legally presumptions ordinarily do [\*399] in other cases. And this is what seems to have been intended by Lord Eldon, in his opinion in *Peacock v. Peacock*, 16 Ves. 49, 56; and was explicitly avowed by Mr. Baron Parke, in *Farrar v. Beswick*, (1 Mood. and Rob. 527.) The real difficulty lies in holding that, where there is an inequality in the stock, or skill, or services, or experience, of the different partners, any one or more of those circumstances alone, or in conjunction with other circumstances, equally indeterminate and unequivocal, should overcome the ordinary presumption of law of equality of shares between the partners. Now, Lord Ellenborough, in *Peacock v. Peacock*, 2 Camp. R. 45, seems to have acted upon the ground that, in every such case of inequality, there was no such presumption of law whatever to govern it; but that it was open for the jury to take into consideration all the circumstances, if the suit were at law, or for the court, if the suit were in equity, and to adjudge the proportions, not upon any supposed contract between parties actually established, but, as it were *ex æquo et bono*, as upon a *quantum meruit*. It was in this view that Lord Eldon seems to have expressed his disapprobation of the doctrine, because it assumed to overthrow a presumption of law (and it would not have been materially different, if it were a presumption of fact) upon indeterminate circumstances, which might be urged with more or less effect to a jury, but which carried no certainty as to the positive intent or contract of the parties. . . . If, by the custom of any particular trade or business under the like circumstances, the rule was general to give a fixed proportion—as, for example, a fourth to one partner, and three-fourths to another, on account of the inequality of capital, or skill, or experience, or age, or the relation of parent and child, that might properly control the presumption of law; for it would amount to strong presumptive evidence, that the partners intended to contract upon the usual terms. But where there are no such circumstances, and nothing determinate in the evidence, but all rests upon conjecture, at best admitting of various force and application, what ground is there to presume a contract for a *quantum meruit*? The more reasonable ground would seem to be, that the parties meant to treat with each other upon a footing of equality, or to waive the inequality, as a matter of liberality, or bounty, or parental or filial affection, or proximity of blood, or personal friendship. There seems also to be very great uncertainty in the application of the doctrine; for from such indeterminate and vague circumstances, very different conclusions might be drawn by different juries and different courts; and it seems far more convenient to adopt a general rule of interpretation of the intention of the parties, in the absence of

[\*400] any \*express or implied agreement or usage, as to the apportionment of the profits. Cases may indeed arise, where the presumption fairly would be, that the parties were to share the profits only in moieties, and not the capital—as, for example, in the case of a partnership between a father and a son, where the father supplied the whole capital. However this may be, the judges of the Scottish Court of Session adopted the doctrine of Lord Eldon in the case of *Thompson v. Williamson*, 7 Bligh, 432; S. C. 5 *Wilson and Shaw*, 16; 7 *Shaw and Dunton*, No. 338; but it was overturned in the house of lords by the decision of Lords Wynford and Brougham. Mr. Bell and Mr. Erskine maintain the same doctrine as the Court of Session, 2 Bell, Comm. B. 7, ch. 1, pp. 614, 615, 5th edit.; Ersk. Inst. B. 3, tit. 3, § 19. Nor does it appear to me that the doctrine of Lord Stair, 1 Stair, Inst., B. 1, tit. 16, § 3, is intended to be different, notwithstanding the suggestion of Lord Wynford. In *Gould v. Gould*, 6 Wend. R. 263, the Court of Errors of New York held that, in the absence of all proof to the contrary, partners will be presumed to be equally interested in the partnership funds. See *Harrison v. Sterry*, 5 Cranch, 289.”

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IN ORDER TO CONSTITUTE A REAL PARTNERSHIP, THERE MUST BE A COMMUNION OF PROFIT AND LOSS; AND A LOAN OF MONEY TO A FIRM BY A RETIRING PARTNER, AT LEGAL INTEREST, AND WITH AN ADDITIONAL ANNUITY FOR A CERTAIN TERM OF YEARS, IS NOT A CONTINUANCE OF THE PARTNERSHIP.

### GRACE v. SMITH.

Easter Term, 1775.—E. 2 W. Bl. 997.

ASSUMPSIT for goods sold and delivered. On trial at the sittings after last term, verdict for the defendant; and now Davy moved for a new trial, the verdict, as he said, being contrary to law and evidence.

DE GREY, C. J., reported, that this was an action brought against Smith alone as a secret partner with one Robinson, to whom the goods were delivered, and who became bankrupt in 1770. That on the 30th of March, 1767, Smith and Robinson entered into partnership for seven [\*401] years, but in the November afterwards, some disputes arising, they \*agreed to dissolve the partnership. The articles were not cancelled, but the dissolution was open and notorious, and was notified to the public on the 17th of November, 1767. The terms of the dissolution were, that all the stock in trade and debts due to the partnership should be carried to the account of Robinson only. That Smith was to have back £4200, which he brought into the trade, and £1000 for the profits then accrued since the commencement of the partnership: That Smith was to lend Robinson £4000, part of this £5200, or let it remain in his hands for seven years at five per cent. interest, and an annuity of £300 per annum, for the same seven years. For all which Robinson gave bond to Smith. In June, 1768, Robinson advanced to Smith £600 for two years' payment of the annuity and other sums by way of interest and gratuities, and other large sums at different times, to enable him to pay the partnership debts, Smith having agreed to receive all that was

due to the partnership, and to pay its debts, but at the hazard of Robinson. That on the 1st of August, 1768, the demands of Smith were all liquidated and consolidated into one,—viz., £5200 due to him on the dissolution of the partnership: £1500 for the remaining five years of the annuity, and £300 for Smith's share of a ship: in all £7000, for which Robinson gave a bond to Smith. That on the 22d of August, 1769, an assignment was made of all Robinson's effects to secure the balance then due to Smith, which was stated to be £10,000. Soon after the commission was awarded.

*Davy*, for the plaintiff, insisted that the agreement between Robinson and Smith was either a secret continuance of the old partnership, or a secret commencement of a new one, being for the retiring partner to leave his money in the visible partner's hands, in order to carry on his trade, and to receive for it twelve and a half per cent. profit, which could not be fairly done, unless it be understood to arise from the profits of the trade; and that he ought therefore to be considered as a secret partner. And he relied much on a case of *Bloxham and Fourdrinier v. Pell and Brooke*, tried at the same sittings, (7th of March, 1775,) before Lord Mansfield in the King's Bench, as in point. "This was also a partnership for seven years between \*Brooke and Pell; but at the end of one year agreed to be dissolved, but no express dissolution was [402] had. The agreement recited that Brooke being desirous to have the profits of the trade to himself, and Pell being desirous to relinquish his right to the trade and profits, it was agreed that Brooke should give Pell a bond for £2485, which Pell had brought into the trade, with interest at five per cent., which was accordingly done. And it was farther agreed, that Brooke should pay to Pell £200 per annum for six years, if Brooke so long lived, as in lieu of the profits of the trade; and Brooke covenanted that Pell should have free liberty to inspect his books. Brooke became a bankrupt before anything was paid to Pell. And this action being brought for a debt incurred by Brooke in the course of trade, Lord Mansfield held that Pell was a secret partner. This was a device to make more than legal interest of money, and if it was not a partnership it was a crime. And it shall not lie in the defendant Pell's mouth to say, 'It is usury, and not a partnership.'"

*Grose and Adair*, for the defendant, argued, that the present case is very distinguishable from that of *Bloxham and Pell*. Pell was to be paid out of the profits of the trade, as appears from the covenant to inspect the books, which else would be useless. His annuity was expressly given, as and in lieu of those profits. It was contingent in another view, as it depended on the life of Brooke, by whom those profits were to be made. In our case the annuity is certain, not casual; it does not depend on carrying on the trade, nor to cease when that is left off, but is due out of the estate of Robinson. It is not a necessary dilemma that it must be either usury or partnership. It may be, and probably was, a premium for the good-will of the trade. Two thousand guineas is no uncommon price for turning over the profits of a trade so beneficial, that it appears to have been rated at £1000 to each partner in the space of less than eight months. And whether that sum is agreed to be paid at once, or

by seven instalments, it is the same thing. Besides, whether there be or be not a secret constructive partnership, is a question proper for a jury, who have here decided it on consideration of all the circumstances.

[\*403] \*DE GREY, C. J.—The only question is, what constitutes a secret partner? Every man who has a share of the profits of a trade ought also to bear his share of the loss. And if any one takes part of the profit, he takes a part of that fund on which the creditor of the trader relies for his payment. If any one advances or lends money to a trader, it is only lent on his general personal security. It is no specific lien upon the profits of the trade, and yet the lender is generally interested in those profits: he relies on them for repayment. And there is no difference whether that money be lent *de novo* or left behind in trade by one of the partners who retires. And whether the terms of that loan be kind or harsh, makes also no manner of difference. I think the true criterion is, to inquire whether Smith agreed to share the profits of the trade with Robinson, or whether he only relied on those profits as a fund of payment: a distinction not more nice than usually occurs in questions of trade or usury. The jury have said this is not payable out of the profits; and I think there is no foundation for granting a new trial.

GOULD, J.—Same opinion.

BLACKSTONE, J.—Same opinion. I think the true criterion (when money is advanced to a trader) is to consider whether the profit or premium is certain and defined, or casual, indefinite, and depending on the accidents of trade. In the former case it is a loan (whether usurious or not, is not material to the present question,) in the latter a partnership. The hazard of loss and profit is not equal and reciprocal, if the lender can receive only a limited sum for the profits of his loan, and yet is made liable to all the losses, all the debts contracted in the trade, to any amount.

NARES, J.—Same opinion.

Rule discharged.

[\*404] \*AN AGREEMENT BETWEEN TWO OR MORE PARTIES TO PURCHASE GOODS IN THE NAME OF ONE OF THEM, AND TO TAKE ALIQUOT SHARES OF THE PURCHASE, BUT NOT TO BE JOINTLY CONCERNED IN THE RESALE OF THEIR SHARES, DOES NOT CONSTITUTE THE PARTIES TO SUCH AGREEMENT PARTNERS; AND ON THE FAILURE OF THE OSTENSIBLE PURCHASER THE OTHER PARTIES ARE NOT LIABLE FOR THE WHOLE PRICE AS PARTNERS WITH HIM, UNLESS THEY HAVE PERMITTED THE OSTENSIBLE PURCHASER TO HOLD THEM OUT TO THE SELLER AS JOINTLY ANSWERABLE WITH HIM FOR THE PRICE.

I.—HOARE v. DAWES.

April 22, 1780.—E. Douglas, R. 371.

THIS was an action for money lent and advanced, which was tried

before Lord Mansfield, at the last sittings at Guildhall, and a verdict found for the defendants.

On Friday, the 14th of April, the solicitor-general obtained a rule to show cause why there should not be a new trial; and this day the case came on to be argued, when the facts appeared, from his lordship's report, to be as follow:—

The plaintiffs, who were bankers, had advanced a sum of money on certain tea-warrants of the East India Company to Contencin, a broker, who deposited the tea-warrants with the plaintiffs as a security, and also gave them his note of hand for the sum advanced. He had been employed by a number of persons, of whom the defendants were two, to purchase a lot of tea at the East India Company's sale, of which they (together with himself) were to have separate shares, the lots being, in general, too large for any one dealer. The practice at such sales is, for the company to give a warrant or warrants to the broker or purchaser, for the delivery of the quantity of tea purchased, on payment being made. At the time of the sale, £25 per cent. is advanced, and is forfeited, unless the whole is paid on the third, which is the last day of payment. If paid sooner allowance is made for prompt payment. The warrants are often pledged, and money raised upon them, generally \*considerably less than the supposed value of the tea. It happened, however, in this [\*405] instance, between the time of the deposit of the warrants with the plaintiffs, and the time when the payment was to be made at the India house, that the value of the tea sunk so much as to be considerably under the amount of the sum advanced. The broker, in the meantime, had become a bankrupt, and had informed the plaintiffs who his employers were, all of whom, except the defendants, were since either dead or become bankrupts. The shares of the defendants were to be two-sixteenths of the whole lot. The ground of the action was, that all the employers of the broker were to be considered as partners, and jointly and severally liable for the whole. The defendants owed nothing upon their own two-sixteenths. There was not any joint concern in the re-disposal of the tea. The defendant produced several bankers and brokers, (of whom Contencin was one,) who said, they had had frequent transactions of this sort, (it being a very usual speculation,) and they always understood, that the only security was the pledge, and the personal security of the broker, unless where the principals were inquired after, and declared, which was very rarely done. That, as the practice was to advance considerably under the supposed value of the tea, and it was also usual to stipulate, that if the money was not repaid within a certain time the lender might sell, the warrant was of itself a general and sufficient security. Contencin said that tea-warrants were considered as cash, and passed by delivery. On the other side, in answer to this evidence, the plaintiffs having at first rested their case on the fact, that there were persons behind the curtain for whom the broker acted, two witnesses were called. One of them, one Cartony, a tea-dealer, swore that a broker had once borrowed some money for him on tea-warrants from the plaintiffs, and that the value of the tea having fallen under the sum advanced, and the broker having failed, he had paid the difference, considering himself as liable.

The other was a person who had also dealt in tea, and in loans of this sort, and he swore that his idea had always been that the persons behind the curtain were liable; but upon cross-examination he said, he never knew any loss happen, nor any demand actually made on the broker's employers.

[\*406] \*Lord MANSFIELD said, when the rule was moved for, that he was very glad the motion had been made, that the question might be re-considered. That at first at the trial he was of opinion with the plaintiffs, thinking this was a case of sleeping partners, but that before the end of the cause he was very clear, that the different employers were only liable for their own shares.

The *Solicitor-General*, *Dunning*, and *Davenport*, for the plaintiffs:—*Bearcroft*, *Lee*, and *Wood*, for the defendants.

Lord MANSFIELD.—I considered this at first as a case of dormant partners. The law with respect to them is not disputed, viz., that they are liable when discovered, because they would otherwise receive usurious interest without any risk; but towards the end of the cause the nature of the transaction, and of these loans, was more clearly explained, and I was satisfied with the verdict, and am now confirmed in my opinion. The evidence of Cartony is irrelevant, because he said the broker borrowed the money for him; and besides, he did not dispute the demand. Is this a partnership between the buyers? I think it is not; but merely an undertaking with the broker by each, for a particular quantity. There is no undertaking by one to advance money for another, nor any agreement to share with one another in the profit or loss. The broker undertakes to buy and sell, but makes no advance without the security of the tea-warrants, which are considered as cash, and pass by delivery like East India bonds. These warrants are pawned with the lender, but the broker has no power to pledge the personal security of the principals. He cannot sell the warrants, and borrow more money on such personal security. It makes no difference whether specific tea or the warrants are delivered at the sale. It would be most dangerous if the credit of a person who engages for a fortieth part, for instance, should be considered as bound for all the other thirty-nine parts. *Non hæc in fœdera veni*. The witnesses did not merely speak to opinion, but to matter of fact, and their own dealings. They said the money was lent to the broker alone. Sometimes, indeed, lenders have required to know the \*principals, [\*407] they did not trust the broker alone; but all others who do not ask after the principals do. The note is given as a collateral security personally by the holder of the warrant, not in the character of a partner with other persons, nor as a broker for them.

WILLES and ASHHURST, Justices, of the same opinion.

BULLER, J.—This is a very plain case. The plaintiffs had no reason to consider the broker as a partner with the other persons, for though he had a share he did not act or appear as a partner, nor were they partners as among themselves. They had never met or contracted together as partners. If this transaction were sufficient to constitute a partnership a broker would have it in his power to make 500 persons partners, who had never seen nor heard of one another, or might at his pleasure

convert his principals into partners or not, without any authority from them, by taking joint or separate warrants.

The rule discharged.

## II.—COOPE v. EYRE.

Trinity Term, 1788.—E. 1 H. Bl. 37.

THIS was an action brought by the owners of a Greenland ship called the Earl of Chatham, against the defendants, on an agreement to purchase oil, the cargo of the ship.

The declaration stated, that on the 29th of August, 1786, the plaintiffs sold the cargo to the defendants, at the rate of £20 per tun, to be received as soon as it was boiled and ready. That by way of collateral security, two bills of exchange were deposited in the hands of the plaintiffs, one of which was accepted by defendants Eyre, Atkinson, and Walton. That the sale being so made, and it being expected that the defendants would not take away the oil pursuant to the terms of the sale, it was afterwards agreed between the plaintiffs and defendants, by the name of Benjamin Eyre and Co., "that the\*plain- [\*408] tiffs should keep the oil in their possession till the 1st of January following; and if the defendants did not pay for it on or before that day, the plaintiffs were to be at liberty to authorize the broker to resell it at the best price he could get; and if upon such resale the oil should not produce £20 per tun with all charges, &c., the plaintiffs were to deduct the difference of the price out of the bills placed in their hands as a collateral security." That the defendants neither paid for nor took away the oil, whereupon the plaintiffs authorized the broker to resell it. That the deficiencies upon the resale amounted to £400, besides brokerage, &c., £100. That the bill of exchange accepted by the defendants was presented to them for payment and refused.

Second count. Sale to defendants; their refusal to pay or take the oil. Resale at a loss of £400, and expenses £100. There were also the common counts,—damages, £3000.

Plea, general issue, by all the defendants except Eyre, who suffered judgment by default, with notice that damages would be assessed against him according to the event of the cause. Before the action was brought Eyre and Co. had become bankrupts.

This was tried at the sittings after last Hilary Term, before Lord Loughborough, by a special jury, when it appeared, that on the 24th of August, the defendants, Eyre for himself and partners, (who were Atkinson and Walton, general merchants,) Hattersley for himself and Stephens, who were oil merchants, and Pugh for himself and son, who were also oil merchants, agreed to purchase jointly as much oil as they could procure, on a prospect that the price of that commodity would rise. That Eyre should be the ostensible buyer, and the others share in his purchase at the same price which he might give. Hattersley and Co. were to have one-fourth, Pugh one-fourth, and Eyre and Co. the remaining moiety. That they bought large quantities of oil belonging to other

ships, and other traders besides the plaintiffs, in the name of Eyre and Co. That Hattersley and Pugh occasionally came forwards and gave directions as to the delivery of the oils, and otherwise interfered in the [\*409] transaction, and also made many declarations, "that they \*were all jointly interested in the different purchases, and that there was a general concern between them."

On the part of the defendants, it was insisted on at the trial that the contract for sale was made between the plaintiffs and Eyre and Co. only, and that the agreement which the defendants entered into between themselves, was only a sub-contract, and did not constitute a partnership. Lord Loughborough, after declaring his opinion, (that as the defendants did not appear to have been jointly concerned, further than the purchase of the oil, they had not such a joint interest in the profits and loss as the law made necessary to a partnership,) directed a verdict to be found for them, which was accordingly done.

*Marshall*, Serjt., having obtained a rule to show cause why a new trial should not be granted on the misdirection of the judge, in Easter Term,

*Bond* and *Le Blanc*, Serjts., showed cause.—The only question is, Whether the three houses jointly contracted with the owners of the ship so as to make them partners? This could not be, since in order to make men partners they must either pledge their joint credit, or be equally interested. Now the credit was here given to Eyre and Co. alone, and the shares of the purchase were unequally divided. Whether it be a secret or avowed partnership the principle is the same; the parties must be possessed like joint tenants *per my et per tout*; each must be interested in the whole, and have a right of survivorship. But if Eyre and his partners had died, Hattersley and Pugh could have had no claim to their shares of the purchase, which would have vested in their executors. The plaintiffs only contracted with Eyre and Co., there was no privity between them and the other defendants.

If a lessee makes an under-lease, the landlord cannot sue the sub-lessee for his rent. If a man should buy a set of horses, and sell a pair of them, the buyer of the pair would not be liable for the whole set, in default of the original purchaser.

In *Hoare v. Dawes*, Dougl. 371, supra, p. 404, and *Grace v. Smith*, 2 Black. 997, supra, p. 400, it is established as essential \*to a [\*410] partnership, either that there should be a contract to share profit and loss, or that the parties should offer their joint credit to the vendor. In *Hoare v. Dawes*, the ostensible agent was alone liable. There a number of persons employed a broker to procure others to join in the purchase of tea; but there is no material difference whether a broker be jointly employed to make a purchase, or separately to find joint-purchasers.

The agreement between the defendants can only be considered as a sub-contract, and not of such a nature as to constitute a partnership.

*Adair*, *Marshall*, and *Runnington*, Serjts., in support of the rule, admitted that a participation of profit and loss was necessary to constitute a partnership, and argued that this was a contract of that nature. Whether the agreement be to divide the goods themselves at a given



time, on the produce on the sale of them, each party runs the same risk, and each has his share of profits and loss, either in the increased or decreased value of the goods, or the increased or decreased price for which they might actually be sold.

The defendants, Hattersley and Pugh, occasionally permitted their names and credit to be used, and holden out as persons jointly concerned; neither of them could say, "*Non hæc in fœdera veni*," while the speculation promised well, and they feared that the whole profit would belong to the assignees of Eyre and Co., they went to Greenland Dock, to secure to themselves their respective shares of the concern; this was holding themselves out as jointly concerned in some of the contracts; but if they were concerned in some they were so in all, as they were all made under the same order. It was known that Eyre had several other persons concerned with him, otherwise he could not have gained credit to so large an amount; but it was not necessary that the vendors should know who the private partners were; they gave credit to them though not by name. The broker would not have made a bargain which could not be fulfilled; he knew that he was acting for responsible persons. But it shall not be in their power after three months have elapsed, by their own act to convert a partnership into a mere agreement. In the case of *Riche v. Coe*, Cowp. 636, the owners \*of a ship let for a term of years to the master, who covenanted to repair her at his sole expense, were [411] held liable for repairs, though the ship-builder supposed the master to be the owner, and gave credit only to him. The firm of a house may have a different meaning according to the nature of the trade. Eyre and Co. as general merchants might mean Eyre, Atkinson, and Walton, but in the oil trade (which was known to be an extraordinary concern) Eyre and Co. meant Eyre and the other defendants, because they were all concerned together in the oil contracts. It is objected that this is not a partnership but only a sub-sale or sub-contract. A sub-contract is a secondary contract depending upon some primary and antecedent one. In the case of a purchase of goods, it means a subsequent agreement to take a part of what has been previously bought, it is like an under-lease of lands. But a previous agreement to share in an intended purchase is a contract of partnership. So if before a lease was granted, the intended lessee were to agree to let another have a share in the concern, that could not be regarded as a sub-contract, the person sharing would in such case be deemed a co-lessee in equity, and would be liable to the rent and covenants; for *qui sentit commodum, sentire debet et onus*. It could not be a sub-sale to Hattersley and Pugh, because each was to have a share on the same terms as Eyre and Co. purchased. But Eyre and Co. were merchants, and merchants never buy to sell again at prime cost. Hattersley and Pugh must therefore be said to have shared originally in these bargains, and not to have purchased any second part of them. The spirit of buying and selling is gain, the spirit of partnership is mutual participation of gain.

It is also objected, that the relation of partners does not exist where one cannot bind the whole, and here no one could sell all that was bought.

This rule is right, but does not apply. The broker did not buy a specific lot for each, but one purchase for all. Till they divided it, therefore, each was entitled to it *per my et per tout*, for each had an undivided share. As Eyre could authorize the broker to buy the whole, so could he authorize him to sell it. Suppose that Eyre had actually sold it, neither Hattersley nor Pugh could have maintained trover against the [\*412] vendee for their \*shares; because any joint owner of a mere personal thing may sell it, and the vendee will have a good title; the co-proprietors can only call upon the vendor for their shares of the purchase-money. If Eyre, before division, had sold the whole at a great profit, Hattersley and Pugh, though they had never advanced any money, would have been entitled to their share of the profits, which proves that they could not claim as sub-purchasers. If Hattersley and Pugh had advanced to Eyre their respective shares of the purchase-money, and Eyre, instead of dividing the oil, had immediately sold it, and divided 15 or 20 per cent. profit, in that case either Hattersley and Pugh must have received usurious interest, or they must have been partners. If the plaintiffs had refused to deliver the oil, and Eyre and Co. having tendered the money, had brought an action against them for the non-delivery, if the previous agreement with Hattersley and Pugh had come out at the trial, Eyre and Co. would have been non-suited, for not joining with Hattersley and Pugh as plaintiffs. But if Eyre and Co. had been permitted to recover in such an action the amount of the improved value of the oil, they must have accounted to Hattersley and Pugh for their respective shares of the profits.

But if Eyre and Co. could not sell, they could make no title to the vendee, and then Hattersley and Pugh might bring trover against the vendee for their shares. But their shares being undivided, the vendee might have pleaded in abatement that Eyre and Co. ought to have been joined as plaintiffs, and if they had been joined the vendee might have shown a sale from some one of the joint-plaintiffs, and non-suited them. From hence it follows, that all the defendants had a joint-property in the goods till division, that any one of them, therefore, in possession might sell, and bind all the others, and consequently that they were partners.

*Cur. adv. vult.*

In this term the judges delivered their opinions as follow :—

[\*413] GOULD, J.—The facts of the present case are shortly these. \*The defendants and Eyre and Co. order one Garforth a broker to buy quantities of oil. The defendants Hattersley and Co. and Pugh and Co. were to have for their respective shares each one-fourth. The broker buys divers ship loads; and to some of the vendors, the defendants, during the treaty, declare it to be a common concern between them and Eyre and Co., in whose name the purchases were made.

But with respect to the plaintiffs, the purchase was made singly in the name of Eyre and Co., without any notification that the defendants had any concern in it.

These purchases were made on speculation, there being a prospect that oil would rise in price; but it afterwards fell, and then the defen-

dants contend that they are not liable to make good the difference, Eyre and Co. having failed.

Upon these facts, two questions arise, 1st, Whether the defendants are partners with Eyre and Co.? 2d, If not, Whether they are to be deemed joint-contractors in the purchase for Eyre and Co., and so liable for the whole?

As to the first, I think they cannot be considered as partners with Eyre and Co. in this purchase from the plaintiffs. Although there may be partnerships in many other instances besides what are merely commercial, as in the case of farms rented by several persons jointly, and of partnerships of attorneys, and the like, yet I think the true criterion is, as stated by Mr. J. Blackstone, in the case of *Grace v. Smith*, "Whether they are concerned in profit and loss;" and the same doctrine is in effect held by Chief-Justice De Grey, in that case.

This is strongly illustrated by *Bloxham and Fourdrinier v. Pell and Brooke*, in B. R., which was cited in *Grace v. Smith*. It there was agreed, that whether the sum of money was a fresh loan, or left in the hands of the man who was originally concerned in the trade in partnership with the person advancing or leaving the money, made no difference.

In both cases the money was left. In *Bloxham's* case he was to have (besides interest) £200 per annum, as and in lieu of his share of the profits, and to have the inspection of the books.

This was properly held to continue his connection as a partner, \*and excluded him from being at liberty to set himself up [\*414] as an usurer.

In the case of *Grace v. Smith*, Smith stipulated to have, besides interest, an annuity of £300 per annum, but not a word to refer it to the trade. And therefore, as the jury found that the defendant was no partner, a new trial was refused; and Blackstone lays it down, that the supposition of its being usury had no influence on the question.

In both instances the annuities were limited to seven years.

It was held in both the cases, that the inequality of the concern as to profit and loss was immaterial to those who dealt with them, however it might be a regulation between themselves.

But in the present case there was no communication between the buyers as to profit or loss. Each party was to have a distinct share of the whole, the one to have no interference with the share of the other, but each to manage his share as he judged best. The profit or loss of the one, might be more or less than that of the other.

In this light I am of opinion there is no foundation for the court to adjudge the present case a partnership; and the jury having found for the defendants, that there is no reason to disturb the verdict.

2d, Whether they can be considered as joint-purchasers?

I think it would be attended with great inconvenience in the common dealings between man and man, to admit that position. The stipulation is, that the purchase should be made as for Eyre and Co. in the total, and each is to have a separate and distinct part. A man goes into Yorkshire to buy as many horses as he can collect, or a limited number, and agrees with a friend that he shall have two. It surely cannot be

contended, that this could make the friend a joint contractor, to subject him, in failure of the other, to pay for the whole bargain.

So in a familiar case, a man is about to buy a tun of wine, and agrees that a friend shall have a hogshead.

And I think the case of *Hoare v. Dawes* is strong on this head. I need not state the case, it having been already stated several times.

[\*415] Lord Mansfield holds it merely "an undertaking with the \*broker by each for a particular quantity, no undertaking by one to advance money for the other, nor to share with one another in profit or loss.

"It would be most dangerous if the credit of a person who engages for a 40th part (for instance) should be considered as bound for the 39 others."

This doctrine falls in exactly with my ideas—I think cases of this nature should stand on broad lines—not on subtleties and refinements, the source of litigation and disputes.

HEATH, J.—The question for the determination of the court is, Whether the contract made with the plaintiffs is so far binding on the defendants Pugh, Hattersley, and Stephens, as to make them liable on the failure of Eyre and Co.?

If this contract may be considered independently of the other contracts given in evidence, there could be little doubt. Eyre and Co. employ Garforth, their broker, to buy oil, and it is agreed that the other defendants shall have aliquot parts when the commodity is purchased.

This is a sub-contract,—by a sub-contract I mean a contract subordinate to another contract made or intended to be made between the contracting parties on one part, or some of them, and a stranger. Eyre and Co. are the only purchasers known to the plaintiffs; entire credit was given to them alone. Pugh, Hattersley, and Stephens, can be liable only in the event of a concealed partnership, on this principle, "that the act of one partner binds all his co-partners on account of the communion of profit and loss." In truth they were not partners, inasmuch as they were only interested in the purchase of the commodity, and not in the subsequent disposition of it.

Great reliance has been placed on this being a joint concern and a joint speculation. It is so between the defendants, but the contracts made with the other vendors are different. A contract made between A. and B. cannot be given in evidence to explain a contract made between A. and C. It is *res inter alios acta*. In fact, the defendants have pledged themselves explicitly with other persons in a different manner. The contracts made with the other merchants are not admissible evidence [\*416] in this cause, except to prove a fraud, if the facts had gone that \*length; namely, that the house of Eyre and Co. as a failing house, was to stand forwards in order to protect the other defendants, who by such means might have the benefit of the speculation if it proved fortunate, without sustaining any loss in the event of its failing. No such evidence has been adduced: on the contrary, it appears that the objection made by the other vendors to the firm of Eyre and Co. was, "that they were unknown and new in the trade."

If Pugh, Hattersley, and Stephens had authorized the broker to purchase aliquot shares for them, this case would have resembled that of *Hoare v. Dawes*, the doctrine of which is confirmed by a passage in the Digest, lib. 17, tit. 2, Pro Socio, § 33, "*qui nolunt inter se contendere, solent per nuntium rem emere in commune, quod a societate longè remotum est.*"

No detriment from this decision can arise to trade, or affect the credit of merchants; for it behooves every contracting party to consider the responsibility of the persons with whom he contracts, and he has also the resource of a dormant partnership, if any such exist and can be proved. For these reasons I am of opinion that the rule ought to be discharged.

WILSON, J.—I am so unfortunate as to differ in opinion from the rest of the court on the present question.

The contract was actually made between the plaintiffs and Eyre and Co.; but if the other defendants were jointly concerned in it they ought to be responsible, as much as if they had personally contracted. That they were so concerned sufficiently appears from the contracts with the other merchants, and their own declarations; these, I think, were proper to be given in evidence, being against themselves, to which evidence the verdict was contrary.

The defendants were all concerned in a general speculation. There was an original agreement between them to purchase as much oil as they could procure. Of what nature that agreement was, there is no evidence precisely to prove, no witness having been present when it was concluded. It might have been such as would have made them jointly answerable, or it might not. How then are we to collect what it was? Surely from the declarations of the parties themselves.

\*Thwaites' evidence proves that Hattersley said "It is all the same whether Eyre or I buy it, it is the same concern." This [\*417] shows it was not a sub-contract. If Hattersley had bought the oil himself he would have been a contractor with Thwaites; and when he who knew what the agreement was between the defendants, declares it to be the same thing whether he or Eyre bought it, he puts himself expressly in the place of an original contractor; the court, then, cannot say that he was a sub-contractor. This declaration was before the purchase of the cargo of the Earl of Chatham, on which the action is brought.

Kilbington, the keeper of Greenland Dock, proved that Hattersley and Pugh both said to him, "we have purchased your oil." This was a direct avowal of their having jointly contracted, which was not done with a view to strengthen the credit of Eyre and Co., being after the purchase was made.

When Captain Dowson expressed some doubts whether Eyre and Co., to whom he had also sold his oil, were able to pay him, Pugh who received it, told him "you are safe," and declared that "he was concerned, and Hattersley was concerned, and a house at Norwich who could buy them all." Now, if they were sub-contractors, this declaration was not true. How could their sub-contract make the vendor safe? Here then is clearly a direct acknowledgment of their being original contractors.

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The evidence also of the broker shows that they all originally contracted ; he delivered accounts to them, and informed Hattersley and Pugh how matters went on. In one instance he was so conscious of their being jointly concerned, that he gave in their names as such to the agent of Yeomans, who would not otherwise have given credit to the name of Eyre and Co.

Upon failure of Eyre and Co., Hattersley and Pugh gave orders to the keeper of the dock, not to give up the oil remaining in the dock in the name of Eyre and Co., and took it as their own. Now they could have had no right to do this if they had been only sub-contractors. Admitting that after goods are delivered, there cannot be such a participation of profit and loss as will make a partnership unless the parties originally contracted, yet their dividing the goods, and each taking his [\*418] share, after delivery, will be good evidence of an \*original contract. Whether the contract were joint or separate, nothing done subsequent can alter the nature of it, but there may be subsequent evidence to prove of what nature it was.

In *Grace v. Smith*, 1 Black. 998, *infra*, p. 400, the terms of the contract were stated. If the terms of this contract had been stated, we might have judged of the responsibility of the defendants ; but not being stated, we must receive their own acknowledgments of responsibility.

In *Hoare v. Dawes*, Dougl. 371, *supra*, p. 404, the question was not between the buyer and seller ; the East India Company were the sellers, and the money must have been paid before the delivery of the goods. In that case there was no agreement between the defendants, but here the declarations of the parties themselves are strong evidence of an original joint-contract. They who best know what their contract was, have declared it to be joint, and we cannot say it was separate. Being acknowledged to be joint in many instances, we must take it to be so in all.

*Clavering v Wesley*, 3 P. Wms. 402, does not apply to the present case, being on the covenants of a lease, which only bound the parties to them. Here all the defendants were interested in the subject-matter.

It has been said that as the credit was given to Eyre and Co. only, the vendors could not be injured, if Eyre and Co. only were liable. But this argument goes to prove that no dormant partner would be answerable for the acts of the ostensible agent.

I am therefore of opinion that a new trial ought to be granted.

LORD LOUGHBOROUGH.—The first impression on my mind was against the defendants, but in the course of the trial my opinion changed, and I thought they were not liable as partners ; I still continue to think so, and consequently that the verdict was proper.

This being an action on a contract of sale, the vendor can have no remedy against any person with whom he has not contracted, unless there be a partnership, in which case all the partners are liable as one individual. It has [\*419] been justly observed, \*that a secret partnership can be no consideration to the vendor ; though for reasons of policy and general expedience the law is positive with respect to the secret partner, that when discovered he shall be liable to the whole extent. In many parts

of Europe limited partnerships are admitted, provided they be entered on a register; but the law of England is otherwise, the rule being, that if a partner shares in advantages, he also shares in all disadvantages. In order to constitute a partnership, a communion of profits and loss is essential. The shares must be joint, though it is not necessary they should be equal. If the parties be jointly concerned in the purchase, they must also be jointly concerned in the future sale, otherwise they are not partners. The late case of the cotton purchase resembled the present, so far as the several parties were each to take aliquot shares; but there no part of the commodity was to be resold without the consent of *all* concerned. Here Eyre was a mere speculator, and the other defendants were to share in the purchase, but were not jointly interested in any subsequent disposition of the property. Though they may by other purchases have concluded themselves as to some particular vendors, yet in the transaction in question there was not that communion between them necessary to make them partners; their agreement was a sub-contract, which, as my brother Heath observed, may be executory; it was to share in a purchase to be made. The seller looked to no other security but Eyre and Co.; to them the credit was given, and they only were liable.

Rule discharged.

### III.—GIBSON v. LUPTON.

Nov. 13th, 1832.—E. 9 Bing. 297. Eng. Com. Law Reps., vol. 23.

ASSUMPSIT for the price of corn sold and delivered by the plaintiffs to the defendants. Plea, general issue. At the trial before Alderson, J., York Spring Assizes, 1832, a verdict was \*taken for the plaintiffs for £623, 7s. 5d., subject to the opinion of the court on the [\*420] following case:—

The plaintiffs were partners, trading at Hamburg under the firm of Messrs. John Fisher and Co. The defendant Lupton was an oil merchant at Leeds, and had had previous dealings in corn with the plaintiffs. The defendant Wood was a corn miller at Headingley, near Leeds, and before the transaction of the 1st December, 1830, hereinafter mentioned, and out of which this action arose, had not had any dealings with the plaintiffs.

The defendants were never in partnership as general partners. On the 1st December, 1830, the defendants gave an order to Slater, the plaintiffs' agent, which was reduced into writing by the defendant Lupton in the following terms:—"Ordered of the house of John Fisher and Co., Hambro', a small loading of wheat, say 750 or 800 quarters of the best red wheat, selected from the most favoured districts, where it can be procured the most free from sprouts, the heaviest in weight, and the best in colour. As to the price, it is left to their discretion, minding to pay proper attention to our interests, both in that as well as time of purchase; and to effect said purchase immediately, if it is imagined

betwixt the present time and Christmas to be done the best. Payment for the same to be drawn upon each of us in the usual manner; supposing that this is for one-third part thereof to be drawn on the purchase, and the other two-thirds at the time of shipment and handing bill of lading."

Slater transmitted a copy of this order to the plaintiffs, and in a letter from him accompanying it, was the following remark:—"Mr. Wood lives at Headingley, near Leeds, a very good man, and imported last season from Tiedeman."

The plaintiffs, in pursuance of the order, purchased a quantity of red wheat in granary at Königsberg, which was to be shipped free on board at Pillau in the spring; and on the 11th of January, 1831, wrote a letter of that date, addressed to "Jonathan Lupton, Leeds, and Thomas Wood, Headingley, near Leeds," in which, among other things, they stated, "we have made a purchase for your joint account, of 756 quarters fine red wheat." "For the first one-third of the price, amounting \*to £756, we have this day drawn at three months, payable [\*421] in London,

£378, Mr. J. Lupton, }  
378, Mr. T. Wood, } own order."

£756.

"And we hereby bind ourselves to you for the regular delivery of this wheat." "On the 25th of February we will value on each of you in like manner at three months date, for £378."

The plaintiffs drew two bills, dated the 11th of January, in conformity with this advice.

February 17, 1831, Lupton wrote as follows to the plaintiffs:—"Neighbour Slater has informed myself and T. Wood of what you have done for us regarding the wheat." "I feel disposed to give you directions to make sales again of that wheat, if you can realize for us a price of 67s. or 70s. per quarter. I have not altogether the authority of my Co. in the business, but I think he will approve of this measure."

February 25, 1831, the plaintiffs wrote an answer addressed, as their letter of the 11th of January, to Jonathan Lupton, Leeds, and Thomas Wood, Headingley, near Leeds, dissuading a resale of the wheat, and adding, "meantime, agreeable to the terms of the contract, we have again paid one-third amount on account of the purchase, and we this day took the liberty of valuing for our reimbursement at three months, payable in London, £180, }  
195, } our order on Jonathan Lupton,

£200, }  
175, } our order on Thomas Wood. And we hereby renew our guaranty given on the 11th ultimo, that we hold you both harmless for the advance up to the period of lading and invoice."

The plaintiffs drew bills in conformity with this advice, and apprised Lupton by letter of April 26, 1831, that they had despatched the wheat; at the same time they forwarded an invoice, and drew upon him one bill of exchange of the same date as the letter, for £448, 7s. 5d. at three



months, and a similar bill for £448, 7s. 5d. on the defendant Wood; this was for the remaining one-third of the price of the wheat, and for \*charges. The letter was addressed like those which preceded [\*422] it, to Lupton, at Leeds, and Wood, at Headingley, near Leeds; and the invoice stated the wheat to be shipped by order, and on account of Lupton, Leeds, and Wood, Headingley, near Leeds. The wheat was duly shipped from Pillau for Goole; the bill of lading was forwarded from Pillau to the plaintiffs at Hamburg; and by them was indorsed and forwarded to the defendants in the letter of the 26th of April, and on coming to the possession of the defendants was indorsed by each of them. The wheat was delivered at Goole, the port of discharge, and the freight and charges were paid by Lupton, partly in cash, and partly by a bill drawn by Wood. It was afterwards shipped for Leeds, and on its arrival was forthwith equally divided between the defendants before it was warehoused. The bills drawn on the 11th of January, 1831, were regularly paid when due by each of the defendants; but on the delivery of the wheat they began to complain of the quality, and on the 3d of May, 1831, Lupton sent to Slater, the plaintiff's agent, a sample, with a note complaining of the bad quality of the wheat. On the 11th of May, the defendant Lupton, in consequence of the dispute respecting the quality of the wheat, wrote a letter of complaint to the plaintiffs, in which he styled the defendant Wood "the half owner." And afterwards addressed a letter to Slater on the same subject, in which he said, "J. L. and T. W. mean to pay 20s. per pound, but they can only pay after being fairly dealt with."

Ultimately, the bills dated the 25th of February, 1831, were accepted by each of the defendants, but were dishonoured when due, in consequence of the dispute as to the quality of the wheat. One of the plaintiffs was then at Leeds, and a negotiation took place as to the renewal of these bills and an allowance on account of the bad quality of the wheat; and renewed bills were ultimately accepted in lieu of the dishonoured bills of February 25, 1831.

The two dishonoured bills of 25th February, 1831, drawn upon defendant Lupton, were delivered by Slater to him, in lieu of his renewed acceptance; and the two bills of the same date, drawn upon Wood, were delivered to him in like manner, upon his accepting a renewed bill for the amount of them. The \*defendant Lupton's renewed acceptance was regularly paid when due; but the defendant Wood's [\*423] was dishonoured; and he became bankrupt in July, 1831.

This action was brought to recover that part of the price which remained unpaid, in consequence of Wood's acceptance being dishonoured. A deduction of £200 from the price was agreed to on the trial of the cause, on condition that the defendant Lupton would undertake not to bring any action against the plaintiffs for deficiency of quality; and the question for the opinion of the court was, whether, at the commencement of the action the defendants were jointly liable for so much of the price of the corn as then remained unpaid.

*Taddy*, Serjt., for the plaintiffs.—The defendants, although not general partners, having concurred in giving an order for an undivided parcel of

wheat, are jointly liable to the plaintiffs. *Waugh v. Carver*, 2 H. Bl. 235. Whatever might have been the arrangement between themselves, their contract, as it respects the plaintiffs, is a joint contract, rendering each defendant responsible for the whole. The order is given by both, they speak in it of "our interests;" the plaintiffs in answer say, "we have made a purchase on your joint account; and bind ourselves to you for the regular delivery." Lupton, in his letter of February 17, 1831, styles Wood his company; the plaintiffs, in their letter of February 25, guarantee *both* up to the time of lading, and forward only one invoice and one bill of lading. If the plaintiffs had failed to observe their guarantee, the defendants must have joined in an action for damages; for the mere fact of payment by separate bills will not render a contract several, which was in its inception joint. Thus, in *Anderson v. Martindale*, 1 East, 497, it was held, that a covenant to and with A., his executors, administrators, and assigns, and to and with B., and her assigns, to pay an annuity to A., his executors, &c., during B.'s life, was a joint covenant to A. and B., in which they had a joint legal interest, although the benefit were for A. only; and that, therefore, on the death of A., the right of action survived to B., and A.'s administrators could not sue on the covenant; and in *Hesketh v. Blanchard*, 4 East, 144, where A., having neither money nor credit, offered to B., that \*if he would [\*424] order with him certain goods to be shipped upon an adventure, if any profit should arise from them, B. should have half for his trouble, it was held, that such a contract constituted a partnership, *quoad* third persons, though as between A. and B. it was only an agreement to pay for trouble and credit.

*Wilds*, Serjt., for the defendants, contended, that taking the whole of this transaction into consideration, it was manifestly the intention of the parties on both sides, that the contract by Lupton and Wood should be several. By the terms of the order, the bills in payment were to be drawn on *each* of the defendants; the plaintiffs' letters, the invoice, and bill of lading, were addressed to the defendants at their several residences, Leeds and Headingley; the bill of lading was indorsed by each separately; and separate bills of exchange were drawn upon and accepted by them. These circumstances, taken together, far outweighed a few loose expressions which seemed to point to a joint interest; and the effect of the contract must depend upon the intention of the parties, as it was to be collected from the whole of their conduct and writings.

*Taddy* having been heard in reply, the court took time to look into the correspondence, and judgment was now delivered by

TINDAL, C. J.—There is no question in this case as to any partnership, *inter se*, between the defendants; for the case states expressly that there was no general partnership between them; and the further statement, that each was to pay for his own moiety of this particular cargo; that the freight and charges were paid by the money of each; and that the cargo was, upon its arrival at Leeds, equally divided between them before it was warehoused, sufficiently show there could be no such joint interest, in profit and loss, in this particular transaction, as is essential to constitute a partnership. But the question is, whether the wheat was

sold to the defendants upon a joint contract; that is, whether upon the correspondence, and other facts set out in the case, the defendants gave the plaintiffs \*reason to understand and believe that they had the joint security of both defendants for the whole cargo; or whether [425] the fair inference to be drawn by any reasonable men,—and if so, the plaintiffs must be taken to have drawn such inference themselves,—was not that each of the defendants contracted separately for his moiety of the joint cargo? And upon looking at the whole of the correspondence, and other circumstances of the case, the latter appears to us to be the proper conclusion. That there are some expressions in the letters, which, if taken separately, raise an ambiguity, must be admitted; unless such had occurred no dispute or question could have arisen; but we think the preponderance very great in favour of the construction, that the contract of sale was separate, and not joint. The plaintiffs rely on the original order being signed by both the defendants; and that the defendants are informed, in reply, that a purchase has been made on their joint account. This is the strongest expression in favour of the plaintiffs' construction. But, on the other hand, the original order itself states that "payment for the same is to be drawn upon each of the defendants," which imports more clearly a separation of interest and of liability; and the further fact, that the plaintiffs, on each occasion, draw a bill for one moiety of the price on one, and for the other moiety on the other defendant,—a circumstance by no means usual in a joint contract,—leads to the same conclusion. Why should the plaintiffs' agent, on transmitting the order, give information of the solvency of the defendant Wood, who was before a stranger to them, if the defendant Lupton, who had dealt with them before, was liable to the whole of the demand? The very form of the address of each letter to each defendant, with his separate place of abode, the form of the invoice, and the indorsement of the bill of lading by each defendant separately, agree with the supposition that the contract was several, not joint. The proposal to the plaintiffs by the defendant Lupton, in his letter of the 17th February, that the plaintiffs should resell, in which he states that he has not altogether the authority of Wood, whom in that letter he calls his "Co.," but in the letter of the 11th May, calls "the half owner," all point to separate interests in the distinct moieties. In the plaintiffs' letter of the 20th \*February [426] to both the defendants, the expression occurs, "we hold you both perfectly harmless for the advances, up to the period of the bill of lading;" an expression more compatible with the supposition that the plaintiffs were treating with the defendants separately, than as jointly liable. It is from these, and some other expressions of a similar nature, that we infer the defendants purchased each of them a moiety of the cargo by the order, and that the plaintiffs must have known such to be the fact; and as this is the conclusion to which we think the jury ought to have arrived upon this statement of facts, we direct the *postea* to be delivered to the defendants.

Judgment for defendants.

AN AGREEMENT BY TWO OR MORE PARTIES, HAVING SEPARATE BUSINESS CONCERNS, TO SHARE IN CERTAIN PORTIONS OF THE PROFITS OF THEIR RESPECTIVE CONCERNS, CONSTITUTES A PARTNERSHIP, IN A QUESTION WITH THIRD PARTIES, ALTHOUGH IT IS PROVIDED BY THE AGREEMENT THAT NONE OF THE CONTRACTING PARTIES SHOULD BE ACCOUNTABLE FOR THE ACTS OR LOSSES OF THE OTHERS, BUT EACH PARTY ONLY FOR HIS OWN.

### I.—WAUGH v. CARVER.

Nov. 23, 1793.—E. 2 H. Bl. 235.

THIS action of assumpsit for goods sold and delivered, work and labour done, &c., was tried at Guildhall before the lord chief-justice, when a verdict was found for the plaintiff, subject to the opinion of the court on a case which stated,

That on the 24th February, 1790, the defendants duly executed articles of agreement, along with Archibald Giesler, by which the latter agreed to allow to the former one full moiety or half part of the commission agency, to be received on all such ships or vessels as may arrive or put into the port of Cowes, or remain in the road to the westward thereof, within the Needles, of which the said Archibald Giesler may procure the address, and likewise one full moiety or half part of the discount on [\*127] the \*bills of the several tradesmen employed in the repairs of such ships or vessels. And the defendants agreed to allow to the said Archibald Giesler, three-fifth parts or shares of the commission or agency to be received by them on account of all such ships or vessels, the commanders whereof may, in consequence of the endeavours, interference, or influence of the said Archibald Giesler, proceed from Cowes to Portsmouth, and there put themselves under the direction of the defendants, in manner hereinbefore mentioned; and likewise one and one-half per cent. on the amount of the bills of the several tradesmen employed in the repairs of such ships or vessels, together with one-fourth part of such sum or sums as may be charged or brought into account for warehouse rent, on the cargoes of such ships or vessels respectively; and also one-sixth part of such sum or sums as may be charged or brought into account for warehouse rent on the cargoes of such ships or vessels as may be landed at Cowes aforesaid; and also one-fourth part or share of the commission or agency to be received by the defendants, on account of all such ships or vessels that may arrive or put into the port of Portsmouth, or remain in the limits thereof, under the care and direction of the defendants; and likewise one half per cent. on the amount of the bills of the several tradesmen employed in the repairs of such ships or vessels. It was further agreed between the parties, that each party should separately run the risk of, and sustain all such loss and losses as may happen on the advance of moneys, in respect of any ships or vessels under the immediate care of either of the said parties respectively; it being the true intent and meaning of these presents, and of the parties hereunto, that neither of them, the contracting parties, shall, at any time or times

during the continuance of this agreement, be in anywise injured, prejudiced, or affected by any loss or losses that may happen to the other of them, or that either of them shall in any degree be answerable or accountable for the acts, deeds, or receipts of the other of them, but that each of them shall in his own person, and with his own goods and effects, respectively be answerable and accountable for his own losses, acts, deeds, and receipts.

In pursuance of these articles, Giesler removed from Plymouth, [\*428] \*and settled at Cowes, where he carried on the business of a ship agent in his own name, and contracted for the goods, &c., which were the subject of the action.

And the question was, Whether the defendants were partners on the true construction of the articles?

This was argued in Trinity Term last by Clayton, Serjt., for the plaintiff, and Rooke, Serjt., for the defendants, and a second time, in the present term, by Le Blanc, Serjt., for the plaintiff, and Lawrence, Serjt., for the defendants. The substance of the arguments for the plaintiff was as follows:—

The question in this case is, Whether the articles of agreement entered into by the defendants constituted a partnership between them? That such was the effect of these articles, will appear by considering the general rules of law respecting partners, and the particular circumstances of the case. The law is that wherever there is a participation of profits a partnership is created, though there is a difference between a participation of profits and a certain annual payment. Thus in *Grace v. Smith*, 2 Black. 998, a retiring partner lent the other who continued in business, a certain sum of money at £5 per cent., and was to have an annuity of £300 a year for seven years, the whole of which was secured by the bond of the partner who remained in trade. This was holden not to make the lender a partner; but Chief-Justice De Grey there said, “The question is, what constitutes a secret partner? Every man who has a share of the profits of a trade, ought also to bear his share of the loss; and if any one takes part of the profits, he takes a part of that fund on which the creditor of the trader relies for his payment. I think the true criterion is, to inquire whether Smith agreed to share the profits of the trade with Robinson, or whether he only relied on those profits as a fund for payment.” And Blackstone, J., also said, “The true criterion, when money is advanced to a trader, is, to consider whether the profit or premium is certain and defined, or casual and indefinite, and depending on the accidents of trade; in the former case it is a loan, in the latter a partnership.” In *Bloxam v. Pell*, cited in *Grace v. Smith*, a sum secured with interest on bond, and also an agreement for an annuity of £200 a year for \*six years, if Brooke so long lived, as in lieu of the profits of the [\*429] trade, with liberty to inspect the books, was holden by Lord Mansfield to constitute a partnership. In *Hoare v. Dawes*, Dougl. 371, a number of persons unknown to each other, and without any communication together, employed the same broker to purchase tea at a sale of the East India Company. The broker bought a lot, to be divided among them according to their respective orders, and pledged the war-

rants with the plaintiff for more money than they turned out to be worth; on the broker becoming a bankrupt the plaintiff sued two of the purchasers, considering them all as secret partners, and liable for the whole. But the court held there was no partnership, and Lord Mansfield said, "There is no undertaking by one to advance money for another, nor any agreement to share with one another in the profit or loss." In *Coope v. Eyre*, 1 H. Bl. 37, and *supra*, p. 407, one of the defendants had bought a quantity of oil of the plaintiffs, and the other defendants had agreed, before the purchase, each to take certain shares of the quantity bought; but when bought, each was to do with his own share as he pleased: they were holden not to be partners, for there was no share of profit or loss. In *Young v. Axtell and Another*, at Guildhall sittings, after Hil., 24 Geo. III. cor. Lord Mansfield; cited by Mr. Serjt. Le Blanc, from a MS. note, which was an action to recover £600 and upwards, for coals sold and delivered by the plaintiff, a coal merchant, an agreement between the defendants was given in evidence, stating that the defendant, Mrs. Axtell, had lately carried on the coal trade, and that the other defendant did the same; that Mrs. Axtell was to bring what customers she could into the business, and that the other was to pay her an annuity, and also 2s. for every chaldron that should be sold to those persons who had been her customers, or were of her recommending. The plaintiff also proved, that bills were made out for goods sold to her customers, in their joint names; and the question was, Whether Mrs. Axtell was liable for the debt? Lord Mansfield said, "He should have rather thought on the agreement only, that Mrs. Axtell would be liable, not on account of the annuity, but the other payment, as that would be increased in proportion as she increased the business. However, as she suffered her name to be used in \*the [430] business, and held herself out as a partner, she was certainly liable, though the plaintiff did not, at the time of dealing know that she was a partner, or that her name was used." And the jury accordingly found a verdict for the plaintiff.

It appearing, therefore, from these authorities, that a participation of profits is sufficient to constitute a partnership, it remains to be seen whether the agreement in question did not establish such a participation of the profits of the agency business between the defendants as to make them liable as partners. In the first place, it is stated in the recital, that the Carvers and Giesler had agreed to allow each other certain proportions of each others' commissions and profits. It is then agreed, that Giesler should, when required by the Carvers, remove from Plymouth to Cowes, and there establish a house; and in consequence of the Carvers' recommendation and assistance to support the house, Giesler is to allow them a moiety of the commission on ships putting into the port of Cowes, or remaining in the road to the westward, addressed to him, and a moiety of the discount on the tradesmen's bills, employed on such ships; he also covenants to advise with the Carvers, and pursue such measures as may appear to them to be for the interest of the concerned. On the other hand, the Carvers agree to pay Giesler three-fifths of the agency of all vessels which shall come from Cowes to Ports-

mouth, and put themselves under the direction of the Carvers, by the recommendation of Giesler, one-half per cent. on tradesmen's bills, and certain proportions of warehouse rent and agency. Each party is likewise to produce true copies of the accounts of the ships to the other, and neither is to form any other connection in the agency business during the period agreed upon; and they are to meet once a year at Gosport to settle their mutual accounts, and pay over the balance. Now, it was not possible to express in clearer terms, an agreement to participate in the profits of the business of ship agents, and to establish a joint concern between the two houses. It may be objected that there is a proviso that neither of the parties shall be answerable for the losses of the other; but this would certainly be not binding on the creditors. *Lord Craven v. Widdows*, 2 Chan. Cas. 139; *Heath v. Percival*, \*1 P. Wms. [\*431] 682; *Rich v. Coe*, Cowp. 686. An agreement to share profits alone cannot prevent the legal consequence of also sharing losses for the benefit of creditors. Perhaps it may be difficult to find an exact definition of a partnership, but it has been always holden, that where there is a share of profits there shall also be share of losses, for whoever takes a part of the capital, or of the profits upon it, takes a part of that fund to which the public have given credit, and to which they look for payment. If there be no original capital, the profits of the trade are themselves a capital, to which the creditor is to have recourse. Thus, if in the year 1791 the profits were £100, and in the year 1792 there was a loss of £10, of course the profits of the preceding year would be the stock to which the creditor would resort for the payment of the debts which constituted part of the loss of the succeeding year. Indeed it is by no means necessary that to constitute a partnership the parties should advance money by way of capital; many joint-trades are carried on without any such advance; there is, therefore, no ground to object in the present instance, that neither party brought any money into a common stock in order to carry on their business.

On behalf of the defendants, the arguments were as follow:—The question is, Whether this agreement creates such a partnership as to make all liable to the debts of each? A partnership may be defined to be, “the relation of persons agreeing to joint stock or labour, and to divide the profits.” Thus Puffendorf described it, “*Contractus societatis est, quo duo pluresve inter se pecuniam, res, aut operas conferunt, eo fine, ut quod inde redit lucri inter singulos pro ratâ dividatur*,” lib. 5, cap. 8. Partners, therefore, can only be liable on the ground of their being joint-contractors, or as partaking of a joint stock. In many cases in which questions of this sort have arisen, and the persons have been holden to be partners, goods had been sold, and a common fund established, to which the creditor might look for payment; and there it was highly reasonable to hold, that if many persons purchase goods on their joint account, though in the name of one only, and are to share the profits of a resale, they shall be considered as joint-contractors, and \*therefore liable as partners. So if a joint stock or capital, or joint labour be employed, each party is interested in the thing [\*432] on which it is employed, and in the profits resulting from it. But in

the present case there is no joint contract for the purchasing goods, nor any joint stock or labour, but the parties are to share in certain proportions the profits of their separate stock and separate labour; there was no house of trade or merchandise established, but two distinct houses, for the purpose of carrying on the business of ship agency, on two distinct accounts. The profits are not a capital unless carried on as capital, and not divided. Ship agents are not traders, but their employment is merely to manage the concerns of such ships in port as are addressed to them. Suppose two fishermen were to agree to share the profits of the fish that each might catch, one would not be liable for mending the nets of the other. So if two watermen agree to divide their fares, neither would be answerable for repairing the other's boat. Nor would any artificers, who entered into similar agreements to share the produce of their separate labour, be obliged to pay for each other's tools or materials. And this is not an agreement as to the agency of all ships with which the parties were concerned, for such as came to the particular address of one were to be the sole profit of that one. It was, indeed, clearly the intent of the parties to the agreement, and is so expressed, that neither should be answerable for the losses, acts, or deeds of the other, and that the agreement should not extend to their separate mercantile concerns. It must therefore be a strong and invariable rule of law that can make the parties to the agreement responsible for each other against their express intent. But all cases of partnership which have been hitherto decided, have proceeded on one or other of the following grounds:—1. Either there has been an avowed authority given to one party to contract for the rest. 2. Or there has been a joint capital or stock. 3. Or, in cases of dormant partners, there has been an appearance of fraud in holding out false colours to the world. Now the present case is not within either of those principles; because there was no authority given to either party to contract for the others; nor was [433] there any joint capital or stock; nor were the public \*deceived by any false credit; no fraud is stated or attempted to be proved, nor can the court collect from the articles that any was intended: it was merely a purchase of Giesler's profits, by giving him a share of those of the Carvers, to prevent a competition between them.

Lord Chief-Justice EYRE.—This case has been extremely well argued, and the discussion of it has enabled me to make up my mind, and removed the only difficulty I felt, which was, whether by construing this to be a partnership, we should not determine, that if there was an annuity granted out of a banking-house, to the widow, for instance, of a deceased partner, it would make her liable to the debts of the house, and involve her in a bankruptcy. But I think this case will not lead to that consequence.

The definition of a partnership cited from Puffendorf is good as between the parties themselves, but not with respect to the world at large. If the question were between A. and B. whether they were partners or not, it would be very well to inquire whether they had contributed, and in what proportions, stock or labour, and on what agreement they were to divide the profits of that contribution. But in all these cases a very



different question arises in which that definition is of little service. The question is generally, not between the parties, as to what shares they shall divide, but respecting creditors claiming a satisfaction out of the funds of a particular house, Who shall be deemed liable in regard to these funds? Now, a case may be stated, in which it is the clear sense of the parties to the contract that they shall not be partners; that A. is to contribute neither labour nor money, and, to go still farther, not to receive any profits. But if he will lend his name as a partner, he becomes, as against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable, if they were to suppose that they lent their money upon the apparent credit of three or four persons, when in fact they lent it only to two of them, to whom, without the others, they would have lent nothing. The argument gone into, however proper for the discussion of the question, is irrelevant \*to a great part of the case. Whether these persons were to interfere more or less with their advice and directions, and many [\*434] small parts of the agreement, I lay entirely out of the case; because it is plain upon the construction of the agreement, if it be construed only between the Carvers and Giesler, that they were not nor ever meant to be partners. They meant each house to carry on trade without risk of each other, and to be at their own loss. Though there was a certain degree of control at one house, it was without an idea that either was to be involved in the consequences of the failure of the other, and without understanding themselves responsible for any circumstances that might happen to the loss of either. That was the agreement between themselves. But the question is, Whether they have not, by parts of their agreement, constituted themselves partners in respect to other persons? The case, therefore, is reduced to the single point, whether the Carvers did not entitle themselves, and did not mean to take a moiety of the profits of Giesler's house, generally and indefinitely as they should arise, at certain times agreed upon for the settlement of their accounts. That they have so done is clear upon the face of the agreement; and upon the authority of *Grace v. Smith*, 2 Black. 998, supra, p. 400, he who takes a moiety of all the profits indefinitely, shall, by operation of law, be made liable to losses, if losses arise, upon the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts. That was the foundation of the decision in *Grace v. Smith*, and I think it stands upon the fair ground of reason. I cannot agree that this was a mere agency, in the sense contended for on the part of the defendants, for there was a risk of profit and loss: a ship-agent employs tradesmen to furnish necessaries for the ship, he contracts with them, and is liable to them; he also makes out their bills in such a way as to determine the charge of commission to the ship-owners. With respect to the commission, indeed, he may be considered as a mere agent, but as to the agency itself, he is as much a trader as any other man, and there is as much risk of profit and loss to the person with whom he contracts, in the transactions with him, as with any other trader. It is true he will gain

[\*435] nothing \*but his discount, but that is a profit in the trade, and there may be losses to him as well as to the owners. If therefore the principle be true, that he who takes the general profits of a partnership must of necessity be made liable to the losses, in order that he may stand in a just situation with regard to the creditors of the house, then this is a case clear of all difficulty. For though, with respect to each other, these persons were not to be considered as partners, yet they have made themselves such with regard to their transactions with the rest of the world. I am therefore of opinion that there ought to be judgment for the plaintiff.

GOULD, J.—I am of the same opinion.

HEATH, J.—I am of the same opinion.

ROOKE, J., having argued the case at the bar, declined giving any opinion.

Judgment for the plaintiff.

## II.—CHEAP v. CRAMOND.

Trinity Term, 1821.—E. 4 B. & Al. 663. Eng. Com. Law Reps., vol. 6.

DECLARATION for work and labour by the bankrupts, before their bankruptcy, in drawing and making out policies of insurance, and in and about causing divers persons to insure ships and goods; and for premiums advanced, &c.; counts for money lent, money had and received, and upon an account stated. Plea, general issue. The cause was tried before Best, J., at the London sittings, before Michaelmas Term.

The bankrupts, who were merchants in London, recommended the defendant to consign goods to the house of Ruxton and Co., at Rio Janeiro, for sale; the latter were to remit the proceeds to the bankrupts, who were to pay over the same to the defendant. The bankrupts, upon receiving advices from Ruxton and Co. that the goods were sold, [\*436] advanced money to the defendant, \*on account, to recover which this action was brought; Ruxton and Co. afterwards failed without remitting the proceeds. It appeared, however, that the bankrupts and Ruxton and Co. divided equally the commissions on the sale of all goods recommended by the one house to the other. Upon this it was argued, that the bankrupts were partners *quoad hoc* with Ruxton and Co., and that the receipt of the proceeds of the goods was, therefore, a receipt by the bankrupts, and the advance by them to the defendant was a payment on account, for which they were liable. The learned judge was of that opinion, and the jury found a verdict for the defendant. A rule nisi for a new trial having been obtained in last Michaelmas Term, on the authority of a case *Muirhead v. Salter*, in which it was said, the Court of Common Pleas had decided that a division of commission between insurance-brokers did not constitute a partnership.

*Marryat* and *Puller* showed cause.—It is a well established principle of law, that a participation in the profits of a trade constitutes a partner-

ship, so as to make the parties participating in such profits liable as partners to other persons. Now here there was clearly a division of profits between the two houses, as to all consignments recommended by the one house to the other; for the commissions constituted the whole profit. *Waugh v. Carver*, 2 H. Bl. 235, is an authority expressly in point. There two ship-agents at different ports entered into an agreement to share in certain proportions the profits of their respective commissions, and the discount on tradesmen's bills employed by them in repairing the ships consigned to them, &c.; and they were held liable, as partners, to all persons with whom either contracted as such agent, although the agreement expressly provided, that neither should be answerable for the acts or losses of the other. The case of *Muirhead v. Salter* is not reported. It does not appear that the motion for a new trial was made, on the ground that the jury ought to have considered the division of the commissions between the insurance-brokers as a participation of profits. The profits of an insurance-broker arise only in part from his commission; a very large proportion of his profits arises from a per centage he receives \*from the underwriters, upon the gross amount of the [\*437] payments he makes to them.

*Scarlett and Campbell*, contra.—It may be admitted that a participation in the profits of a trade constitutes a partnership as to third persons. It will appear, however, from all the authorities on the subject, that the participation should be in the profits. In *Ex parte Hamper*, 17 Ves. 404, Lord Eldon lays it down, that if a trader agrees to pay another person for his labour in a concern a sum of money even in proportion to the profits equal to a certain share, that will not make him a partner. In *Bloxham v. Pell*, cited in *Grace v. Smith*, the outgoing partner was to have, besides interest for his capital, an annuity of £200 for six years, as in lieu of the profits of the trade; and in *Grace v. Smith*, 2 Sir W. Black, 998, De Grey, C. J., speaking of money left behind in trade by a retiring partner, says, "The true criterion is, to inquire whether the retiring partner agreed to share the profits with the remaining partner, or whether he only relied on those profits as a fund of payment." In the case, too, of *Waugh v. Carver*, 2 H. Bl. 235, the agreement was, in effect, for a share of the profits; for it was expressly stipulated in that case, that one-fifth part of the commission on each ship should be retained, as a full compensation for clerks, and other incidental charges and expenses, after which deductions, the then remaining balance of commission should be divided. In that case, the gross proceeds were the entire commissions received. The expenses of carrying on the business were estimated at a sum equal to one-fifth of the commissions generally earned. The residue was clear profit, and it was that profit which the parties were to share. There, likewise, there was a participation in the profit arising from the discount on tradesmen's bills and other dealings of the two houses. But in this case, the parties were to share the gross proceeds of the business, and not the profits, for, as factors, they had to pay the expenses of clerks, of warehouses, &c. The commission was the source only from which the profits were to arise. The profit is the surplus which remains after deducting all expenses. In *Dixon v. Cooper*, 3 Wils. 40, it was held,

[\*438] that a factor who sold for the plaintiff, and was to have \*one shilling in the pound upon the sale, was a good witness to prove the contract; and in *Benjamin v. Porteus*, 2 H. Bl. 590, a person employed to sell goods, and who was to have for himself whatever money he could procure for them beyond a stated sum, was held to be a competent witness to prove the contract between the seller and buyer. According to the argument on the other side, in both these cases, the broker participated in the profit, and was therefore a partner, and, consequently, was interested, and if so, not a competent witness. The proposition contended for on the part of the defendant goes to this extent, that if a party, with or without consideration, gives to another a share in commissions, he makes the donee a partner; and so it would be the case with every person who is paid for his trouble by a per centage; and thus, ship-brokers who are paid in that mode by a per centage on the freight, or surveyors, who are paid by a per centage on the tradesmen's bills, might be considered partners. In *Muirhead v. Salter*, (not reported,) the Court of Common Pleas held, that a division of the commissions on effecting particular policies between insurance-brokers did not constitute a partnership. That case was tried before the late Lord Chief-Justice Gibbs, who told the jury, that the division of the commissions did constitute a partnership. They found, however, against his direction, and that great judge, with his brethren, afterwards thought that the jury were right, and refused to disturb their verdict.

*Cur. adv. vult.*

The judgment of the court was delivered in the course of this term by

ABBOTT, C. J.—This cause was tried at Guildhall, before my brother Best, and a verdict under his direction found for the defendant. A motion was afterwards made for a new trial, and a rule to show cause having been granted, the case was very elaborately argued before us at this place, before last Easter Term. The real question in the cause is, whether the bankrupts, who were merchants in London, are to be considered as partners with the house of Ruxton at Rio Janeiro, with reference \*to [\*439] the transaction in question. The action is for money had and received to the use of the bankrupts. The facts are these:—The defendant having occasion to send goods to Rio Janeiro, for sale there, applied to the bankrupts for recommendation to a house at that place; they recommended Ruxton, and the goods were consigned to him. Ruxton was to remit the proceeds in money or goods to the bankrupts, who were to pay over the money to the defendant, or sell the goods, and account to him for the proceeds. The correspondence was carried on between the bankrupts and Ruxton, the defendant not communicating directly with Ruxton. The latter sold the goods, and having advised the bankrupts thereof, they advanced a sum of money to the defendant in anticipation of the remittance expected from Ruxton, and the latter having failed, and made no remittance, this action was brought to recover the money so advanced. And if there had been nothing more in the case, the plaintiffs had an undoubted right to recover. But it came out at the trial that the bankrupts and Ruxton were in the habit of dividing equally the commissions received by each other on the sales of all goods recommended, or “influ-

enced," according to the expression of the witnesses, by the one house to the other; and according to this habit and course of dealing, the bankrupts were entitled to half the commission received by Ruxton, on the sale of the defendant's goods, and he would be entitled to one-half of the commission, if any, charged by them, on their receipt of the proceeds in London, had the proceeds been duly remitted. And upon this evidence, it was contended on the part of the defendant, that the bankrupts were to be considered as joint factors, or partners, *quoad hoc*, with Ruxton; and consequently, that his receipt was in effect a receipt by them, and so the advance of the money by them to the defendant was in effect merely a payment of money for which they were previously accountable to him. And in support of this proposition, the case of *Waugh v. Carver*, 2 H. Bl. 235, was cited and relied on. And we are all of opinion that the present case cannot be distinguished in principle from that, and that our decision must be governed by it. It is true, that in that case a definite part of the commission was, by agreement of the parties, to be deducted as compensation for the charges and expenses before a division took place; and also that each party was to share in some specified [\*440] measure with the other, in other parts of the profits of their respective business, such as warehouse rent, and discount upon tradesmen's bills. And it was contended in this case, on the part of the plaintiffs, that the bankrupts and Ruxton were to be considered as dividing the gross proceeds only, and not the net proceeds or profits of each other's agency or factorage; and that a division of gross proceeds does not constitute a partnership. We think, however, that the previous deduction of a definite part of the commission before the division in the case cited, is an unimportant fact. It cannot have the effect in all cases of leaving the remainder as clear profit, because the expense and charge cannot be in all cases uniformly the same, but must vary with the particular circumstances of each transaction; so that in effect a part only of the gross commission, or proceeds of the agency, and not the whole, was to be divided in that case; and taking the definite deducted part at a fifth, or any other aliquot part, the absent house, instead of receiving one-half, as in the case at bar, would by the agreement receive two-fifths, or some other definite part of the whole gross sum, and not an indefinite part thereof, depending upon the actual and clear profit of the transaction. And although in the case of *Waugh v. Carver*, the agreement was not confined to a division of the commission, but extended also to the moneys received in certain other parts of the transactions of the two houses, yet the principle of the decision is not affected by that circumstance, the principle being, that where two houses agree that each shall share with the other the money received in a certain part of the business, they are as to such part partners with regard to those who deal with them therein, though they may not be partners *inter se*. By the effect of such an agreement, each house receives from the other a part of that fund on which the creditors of the other rely for payment of their demands, according to the language of Lord Chief-Justice De Grey, in the case of *Grace v. Smith*. And such an agreement is perfectly distinct from the cases put in the argument before us, of remuneration made to a traveller, or other clerk or

agent, by a portion of the sums received by or for his master or principal [\*441] \*in lieu of a fixed salary, which is only a mode of payment adopted to increase or secure exertion. It is distinct also from the case of a factor receiving for his commission a per centage on the amount of the price of the goods sold by him, instead of a certain sum proportioned to the quantity of the goods sold, as was the case of *Dixon v. Cooper*, wherein it was held, that the factor was a competent witness to prove the sale. It differs also from the case of a person receiving from a trader an agreed sum, in respect of goods sold by his recommendation, at one shilling per chaldron on coals, or the like, for there there is no mutuality, and such a case resembles a payment made to an agent for procuring orders, and has no distinct reference in the terms of the agreement to any particular coals purchased by the coal-merchant for resale upon which a third person may become a creditor of the coal-merchant, and probably could not in any instance be shown to apply in its execution to any such particular purchase. But it is to be observed, that even on a case of this nature, the inclination of Lord Mansfield's opinion, in *Young v. Axtell*, cited 2 Hen. Bla. 242, was that such an agreement might constitute a partnership. Of the case of *Muirhead v. Salter*, referred to in the argument, we have neither the facts nor the ground of decision brought before us with sufficient accuracy, to enable us to consider it as an authority on the present question. It may have been that the division of the commission between the two insurance brokers was a solitary instance; that the assured had recognised the second broker as being the person employed by himself; or that the court did not think fit, under all the circumstances of the particular case, to disturb the verdict of a jury of merchants, as to the effect of a division of the commission in that particular species of agency, the divided commission being, as I understand, payable for effecting the policy, and not for receiving the money from the underwriters in the event of the loss, and payable whether any loss had occurred or not. So that we cannot consider that case as having contravened or weakened the authority of the decision in *Waugh v. Carver*. Upon the authority of this latter case, and for the reasons already given, we think the direction of the learned judge at the trial, and the verdict of the jury, are right, and that the \*rule [\*442] for a new trial ought to be discharged. But as it has been strongly urged, that our decision in the present case will be of most extensive consequence upon foreign commerce, although we are by no means convinced that such is really the fact, we will allow the rule to be drawn up, to set aside the verdict, and enter a nonsuit, if the plaintiffs desire it, in order to afford them an opportunity of putting the facts upon the record.

Rule discharged.

IN ORDER TO CONSTITUTE A PARTNERSHIP IT IS NOT NECESSARY THAT THERE SHOULD BE A COMMUNITY OF INTEREST IN THE CAPITAL STOCK, AS WELL AS IN THE PROFIT AND LOSS.

### SMITH v. WATSON.

Mich. Term, 1824.—E. 2 B. & C. 401. Eng. Com. Law Reps., vol. 9.

ASSUMPSIT for money lent and advanced, had and received, and upon an account stated, by and between the bankrupt and the defendants, before his bankruptcy. There was also another count, upon an account stated between the plaintiffs, as assignees, and the defendants. Plea, general issue. The cause was tried before Bayley, J., at the last assizes for the county of York. The plaintiffs were the assignees of the estate and effects of J. H. Sampson, a bankrupt, under a commission, which issued on the 1st February 1823, founded on an act of bankruptcy committed on the 28th January preceding. The bankrupt, in 1822 and 1823, carried on business at Hull as a merchant and wharfinger, under the firm of George Holden and Co., and the defendants were bankers there, with whom the bankrupt kept cash. On the part of the plaintiffs it was proved, that the bankrupt, on the 22d January, 1823, paid into the hands of the defendants a bill of exchange of that date, drawn by him in the name of G. Holden and Co., upon one Le Cointe, for £1689, payable two months after date, and that the defendants at that time gave him credit in account for that sum. \*This bill was not accepted when presented, but the amount of it was afterwards paid by the [443] acceptor, and received by the defendants, and by their pass-book it appeared that there was due to the bankrupt, provided the whole proceeds of the bill belonged to him, a balance of £493, 2s. 9d. That sum the defendants, on the 12th May, 1823, paid, under an indemnity, to one George Gill, who claimed to be a partner with the bankrupt in the proceeds of the bill. The defence was, that Gill was a partner with Sampson in considerable speculations in whalebone; that the bill was drawn upon Le Cointe, upon account of a parcel of whalebone purchased by him, and which was the joint property of Gill and bankrupt, and that the defendants were therefore justified in paying to Gill the balance due upon that bill. In support of this case it was proved by several witnesses, that in August, 1822, it had been verbally agreed, between Sampson and Gill, that the former should buy whalebone, through Gill, as his broker, and that as a remuneration for his trouble, he should receive one-fourth of the profits arising from the sale, and bear one-eighth proportion of the losses. Under this agreement various parcels of whalebone were bought and sold, which yielded a considerable profit, but all the transactions under it were concluded in 1822. Sampson then entered into other speculations in 1823, and continued to employ Gill as broker, and upon these latter transactions it was agreed that Gill should receive one-third of the profits. It did not appear whether he was to bear any proportion of the losses on these latter transactions. All the witnesses stated that Sampson employed Gill to pur-

chase and sell whalebone, as a broker, and that he never spoke of him otherwise than as his agent. It appeared further, that when Sampson brought the bill of £1689 to the defendants in January, 1823, he stated that it was drawn upon Le Cointe for whalebone. The account of the bankers was kept in the name of G. Holden and Co., and there was no other account in which Sampson had any interest. After the bill was paid in, several payments were made on account of G. Holden and Co. to a considerable amount; and until the bill was paid there was a balance against that firm. Le Cointe refused to accept the bill until the whalebone was delivered, which did not take place till the 8th February, and \*on that day Gill gave the defendants notice that the [\*444] bill was his. Upon this evidence it was contended, that Gill was not a partner in the property purchased, although he might be liable as a partner to third persons, in respect of any claims arising out of the speculations before mentioned; and secondly, assuming that he was a partner in the property, he was only a secret partner, and then his share of the property having continued, with his consent, in the order and disposition of Sampson, to the time of his act of bankruptcy, passed to his assignees, under the Statute 21 Jac. I. c. 19. The learned judge reserved both the points, and the plaintiffs had a verdict, the defendants having liberty to move to enter a nonsuit. A rule *nisi* having been obtained for that purpose in last Michaelmas Term,

*Brougham*, with whom were Parke and Alderson, now showed cause, and contended, first, that although Gill might be liable as a partner to third persons, he had no property in the whalebone purchased. The purchases having been made by him as a broker, must have been made in the name of the bankrupt. He cited *Meyer v. Sharpe*, 5 Taunt. 74, and *Hesketh v. Blanchard*, 4 East, 144, as authorities in point. Secondly, assuming that Gill had a property in the whalebone purchased, and in the proceeds of the bill, which was the subject of the present action, he was only a secret partner; and then the case of *Ex parte Gilpin* is an authority to show that the balance of those proceeds will pass to Sampson's assignees, under the 21 Jac. I. c. 19, § 11. (He was then stopped by the court.)

*Tindal*, contra, in support of the rule, made two points; first, that Gill was the partner of Sampson in the whalebone purchased; and if so, secondly, that he had a right, notwithstanding the bankruptcy of the latter, to his share of the proceeds of the bill in question, inasmuch as they had not been mixed up with the general property of the bankrupt. As to the first point, it was agreed in the first instance between Gill and Sampson, that the former should share in both profit and loss; under such an agreement they must, according to all the authorities, be considered [\*445] as partners; but assuming that he \*was not to bear any proportion of the loss upon the purchases made in 1823, still the right to participate in the profits specifically, made him a partner. In *Waugh v. Carver*, 2 H. Bl. 235; see also *Cheap v. Cramond*, *supra*, p. 436, it was expressly held that an agreement not to share in losses did not prevent the parties being partners. It is true that an agreement that a broker shall have for his own profit whatever he can obtain upon the



sales above a certain sum, does not make him liable as a partner to third persons, *Benjamin v. Porteus*, 2 H. Bl. 590; *Dry v. Boswell*, 1 Camp. 329; but it has been laid down, that if a person agree to pay another for his labour in a concern, a given sum in proportion to a given quantum of the profits, this does not constitute a partnership as to third persons, but that it does constitute a partnership if he have specific interest in the profits themselves as profits. *Ex parte Hamper*, 17 Ves. 404. *Meyer v. Sharpe*, 5 Taunt. 74, has been cited to show that Gill had no interest in the property, but in that case the bankrupt himself proved that he was the sole owner of the cargo. Here there is no evidence to show that Sampson was the sole owner of the whalebone; and if not, then the very agreement to share in the profits makes a party not only liable as a partner to third persons, but gives him a joint interest in that property out of which his profit is to arise, or in respect of which he is to incur a legal liability. Secondly, if Gill was a partner he had a right to claim his share of the proceeds of this bill notwithstanding the bankruptcy of Sampson. Here the bill existed in specie at the time of the act of bankruptcy. It was not accepted till the 8th February, and on that very day Gill gave notice to the defendants that the bill was his. The proceeds of the bill never mixed with Sampson's money, for the balance of the banker's account was always against him until the bill was paid. The bankrupt and Gill were tenants in common of the bill of exchange. If Gill had been an open ostensible partner, it is clear that he as solvent partner, might dispose of the partnership proceeds. *Fox v. Hanbury*, Cowper, 448; *Smith v. Stokes*, 1 East, 363; *Smith v. Oriell*, 1 East, 368. This is not a case within the statute 21 Jac. I. c. 19, § 11. That statute contemplates two different persons as the true owner and the reputed owner. Here the \*bankrupt was both. The object of the statute was to put a loan off, or entrusting the bankrupt with goods in the same [\*446] situation as a loan of money, and so to make a dividend only payable in each case. Factors are expressly excepted, and dormant partners ought to be considered as virtually excepted. In *Ex parte Gilpin*, the partnership ceased in 1817, and the share of the dormant partner was suffered to remain in the custody of the bankrupt for two years. But here, at the time of the bankruptcy the partnership still continued, and the bill of exchange was in specie, and before it became due, notice of Gill's interest was given to the bankers. In *Kirkley v. Hodgson*, 1 B. and C. 588, there was an express stipulation, that the bankrupt should continue the apparent owner of the whole ship. There the property once belonged to the bankrupt alone, and he conveyed away part, and kept the possession of the part so conveyed. Here the whalebone and the bill of exchange did not belong to the bankrupt alone. In *Ex parte Flynn*, 1 Atk. 185, the bankrupt was tenant in common, and the interest of his cotenant in common was held not to pass to his assignees; and that was the true ground of the decision, as appears by *Mucklow v. Mangles*, 1 Taunt. 318. But in *Coldwell v. Gregory*, 1 Price, 119, the court of exchequer decided, that a dormant partner was not within the statute 21 Jac. I. c. 19, § 11. [BAYLEY. J.—That case was considered by this court in *Ex parte Gilpin*, and we certified that a secret partner was within the statute.

BEST, J.—I could not have signed the certificate sent in that case, unless I had satisfied myself that the decision in *Coldwell v. Gregory* cannot be supported.]

BAYLEY, J.—After the discussion which this case has undergone, I do not feel any difficulty in pronouncing a decision upon it. The defendants were the bankers of Sampson, who traded under the firm of Holdon and Co., and as such were *prima facie* bound to account to him before his bankruptcy, and to his assignees after his bankruptcy, for all property which had come from him to their hands. Instead of so accounting, they paid over to Gill part of the proceeds of a bill which they had received from Sampson. It lies upon them therefore to show that [\*447] they were justified in making that payment; for if \*an agent takes upon himself to make over the property of his principal to another person, the onus lies upon him to show that he had authority so to do. It is said that they were justified in so doing, because the money was the joint property of Sampson and Gill, inasmuch as it was part of the proceeds of a bill drawn by Sampson for the price of whalebone, which was the joint property of him and Gill. Had it been purchased in their joint names, the property in it would have been joint, and the defendants would have been justified in making this payment to Gill; but there is no evidence to show that the whalebone was purchased in the name of Gill, or that he ever had any property in it. It is said, that the jury ought, upon the evidence, to have found that Gill was a partner in this property; I think, however, that the inference is the other way. All the witnesses speak of Gill as a broker, who was to be paid for his trouble in a particular way, viz., by a share of the profits. Now a right to share in the profits of a particular adventure, may have the effect of rendering a person liable to third persons as a partner, in respect of transactions arising out of the particular adventure in the profits of which he is to participate; but it does not give him any interest in the property itself, which was the subject-matter of the adventure. Gill's right to claim property in the whalebone must arise out of the terms of the bargain with Sampson; and, looking to them, it appears clearly that it was not joint property. It may be assumed that it was purchased in the name of Sampson only, for Gill was a mere agent, and was to have a proportion of the profits in lieu of brokerage. Considering the question in this view, I am clearly of opinion that Gill had no property in the whalebone, or in the proceeds of the bill; and that being so, the question on the statute of James does not necessarily arise, but still the case is very strong in that respect; for, if Gill was a partner, it is quite clear, upon the evidence, that he was a secret partner only. The bill was not specifically appropriated to the whalebone account, or to any transaction in which Gill was concerned, but was to be applied to the general purposes of Sampson's trade. Gill, the secret partner, therefore suffered Sampson to appear to the world as the sole owner of the bill, and the latter had the [\*448] order and disposition of the proceeds, with the consent \*of the true owner, within the meaning of the statute of the 21 Jac. I. c. 19, § 11. The object of which statute was, that that which appears to be the case should be taken really to be so against him who allows such

appearances to exist. Upon both grounds I think that this rule must be discharged.

HOLROYD, J.—I am of opinion that both the points which have been raised must be decided against the defendants. Assuming it to have been agreed between Sampson and Gill that the latter should make purchases of whalebone, and in lieu of brokerage should have one-third of the profits arising out of the sales, and that he should even bear a certain proportion of the losses, I am of opinion that, although such an agreement might make Gill liable as a partner to third persons, yet that it did not vest in him any interest in the whalebone purchased with the money of Sampson. Such an agreement would not convert that which was obtained by the separate property of Sampson into the joint property of Sampson and Gill. It may be collected from the evidence that the latter did not furnish any part of the money required to pay for the whalebone, and that the contracts of sale were made, not in his name, but in that of Sampson, for Gill was to act as broker only, and to receive a share of the profits in lieu of his brokerage. The money paid for the whalebone being therefore Sampson's separate property, and the contracts being made in his name as the purchaser, the property in the things purchased would vest, by virtue of the contracts, in him alone. It has been contended that the legal effect of an agreement, to allow to a broker a share of the profits of goods purchased by him, is to vest in the party entitled to that proportion of the profits, the same proportion of the property purchased, and, therefore, that in this case Gill became tenant in common, or joint tenant as to that part of the property. If Sampson had in terms agreed that Gill should have that proportion of the property itself, it would no doubt have become the joint property of the two. But here the agreement is wholly different, and it is perfectly consistent with it that Sampson should retain the entire interest in the property. It may have been a reasonable bargain that Gill, in lieu of a brokerage, which was a sum certain, should \*receive a share of the profits, which were contingent and uncertain. But it might be most unreasonable that in consideration of giving up his brokerage Gill should have the same proportion of the property itself, which was purchased with the funds of Sampson. Gill would thereby have a control over the property itself, while Sampson continued the only person *prima facie* and ostensible, subject to all liabilities accruing in respect of it. It would, therefore, be contrary to the intention of the parties, to construe such an agreement to have the effect of giving to the party entitled to share in the profits any interest in the property itself. It may, indeed, by a general rule of law, founded upon reasons of policy, render him liable as a partner to third persons. But the power over the property in this case remains as it was before the money was converted into goods in the purchaser. I am also of opinion, that if Gill was a partner he was a secret partner only, and if so, then he, being owner of part of the whalebone, and of the bill which was given in payment for a parcel of such whalebone, suffered Sampson to appear to the world as the owner of the whole. The latter continued in possession of the bill down to the time of his act of bankruptcy. It was, therefore, in his order and disposition, with the con-

sent of the true owner, within the meaning of the statute of James. For these reasons I am of opinion that this rule ought to be discharged.

BEST, J.—There are two questions in this case, the first is whether Sampson and Gill had a joint interest in the whalebone, and assuming that they had, then the second question is, whether that part of the property which Gill had in this bill of exchange was not in the possession, order, and disposition of the bankrupt at the time of the act of bankruptcy, with the consent of the true owner, within the meaning of the statute 21 Jac. I. c. 19, § 11. Now, upon the first question, I am clearly of opinion that Gill had not any joint interest in this property. The question is not whether he is liable to third persons, as a partner, but whether he had such joint interest. There are many cases where a person may be liable to third persons as a partner, and yet not have any interest in the property. Thus, a person who retires from a house of [\*450] trade and \*suffers his name to continue in the firm, after he has ceased to be an actual partner, is liable to the world as a partner, although the property belongs entirely to other persons. It has been urged that this may be considered as a question between Sampson and Gill, if no bankruptcy had intervened. If the former in such a case had brought an action for the balance of the proceeds of the bill, he might have recovered, for it is clear that Gill had no share in the property. The person furnishing the capital, and making himself responsible for the debts arising out of the adventure, was surely entitled to the control over the proceeds. All the evidence shows that Gill was to act merely as broker, and not to appear as a partner; he, therefore, would not be liable to the engagements entered into in the course of the transaction. It is quite clear, therefore, that the property belonged to Sampson; the bill was his, and he paid it into the hands of the defendants, and if that be so, then he alone had a right to receive the proceeds from them. But supposing Sampson and Gill to have been partners, the latter was clearly a secret partner; and in *Ex parte Gilpin* we decided, that the Statute 21 Jac. I. c. 19, § 11, applied to a secret partner, who permitted his share of the partnership property to continue in the possession of the bankrupt up to the time of his bankruptcy. We could not have certified as we did in that case unless we had thought that the case of *Coldwell v. Gregory* could not be supported. I was fortified in that opinion by that of the Lord Chancellor, in *Ex parte Dyster*. Independently of that authority I think that the decision in *Coldwell v. Gregory* cannot be supported without repealing the statute, which contains no exception in favour of secret partners. I cannot, indeed, readily conceive any case more completely within the mischief which the enactment was intended to remedy. For if a secret partnership could be set up as an answer to assignees claiming property which had been left in the order and disposition of the bankrupt, as apparent owner, enormous debts, unconnected with the partnership business might be contracted upon the credit gained by the possession of property, which a person wholly unknown to the creditors might claim, to the exclusion of their just demands. I therefore entirely concur in thinking that there is no ground for a new trial.

Rule discharged.

\*WHERE A PARTY ADVANCES MONEY TO ANOTHER TO ASSIST HIM TO PROSECUTE AN ADVENTURE ON AN AGREEMENT THAT HE IS TO RECEIVE HALF OF THE PROFITS OF THE ADVENTURE, HE IS NOT HELD TO BE A PARTNER IN A QUESTION WITH THE OTHER PARTY, ALTHOUGH HE IS SO IN A QUESTION WITH THIRD PARTIES. [\*451]

### HESKETH v. BLANCHARD.

June 28, 1803.—E. 4 East, 143.

THIS was an action for goods sold and delivered, and on the common money counts. The defendant pleaded the general issue, and paid £50 into court upon the count for goods sold and delivered, which was laid out of the question in the ultimate consideration of the case.

With respect to the count for money paid, laid out, and expended by the plaintiff for the use of the testator, the case appeared to be this. The plaintiff was a draper and tailor, with whom the testator, who had been a captain of a vessel in the African trade, had had dealings for several years. In the spring of 1800 the plaintiff applied to Robertson, who was then about to sail for the coast of Africa, for orders, who declined giving him any, saying he knew of something else which would answer better; but as he had no sufficient credit for himself, nor ready money, he requested the plaintiff to go with him to one Corfe, a butcher, and order certain quantities of beef and tripe, to take with him on the voyage, promising that if any profit should arise from them the plaintiff should have one-half for his trouble. Corfe accordingly furnished the articles, to the value of £75, and sent them on board Robertson's ship by the desire of the plaintiff and Robertson, both of whom he made debtors for the goods; and being examined as a witness at the trial, he also swore that he would not have trusted Robertson alone. After the goods were shipped, Robertson desired the plaintiff to make an insurance. The plaintiff afterwards paid Corfe the whole sum; and Robertson being since dead, without having come to any settlement with the plaintiff, he brought this action to recover the money so paid. At the trial before [\*452] \*Rooke, J., at the last Lancaster Assizes, it was objected by the defendant's counsel, that as the parties were to divide the profits, if any, they must necessarily be equally liable to any loss, and therefore the agreement constituting a partnership, the action was not maintainable by one partner against the other. To this it was answered, on the part of the plaintiff, that it was not a connection of profit and loss, but a simple payment of money for the use of another, upon an undertaking by that other to pay him half the profit of a certain adventure, supposing it to be successful; and that though the plaintiff had made himself responsible to Corfe for the value of the articles furnished upon his credit jointly with that of Robertson, yet as between themselves, or in any other respect, there was no partnership. It was thereupon agreed to take the opinion of this court upon the point; and the jury were accordingly directed to find a verdict for the plaintiff for £75, subject to the opinion of this

court, Whether the plaintiff was entitled to recover the whole or a moiety? and if the court should be of opinion that he was not entitled to recover anything, a nonsuit was to be entered.

*Park and Wood*, who were to have shown cause against a rule for entering a nonsuit, after stating the facts of the case, and making the distinction above noticed, were stopped by the court.

*Topping and J. Clarke*, contra, said that there might be a partnership in a particular transaction or adventure, as well as in a general trade, and this was of the former kind. That in *Grace v. Smith*, 2 Blac. 998, the transaction between Smith and one Robinson, who had individually contracted the debt for which the action was brought, was holden not to be a partnership, because the share which Smith was to receive was not payable out of the profits of the trade, but was a personal demand on Robinson; whereas here the agreement was in terms for the plaintiff to have one-half of the profit of the adventure. And this principle was not controverted by Lord C. J. Eyre in *Waugh v. Carver*, 2 H. Blac. 235, and vide *Morse v. Wilson*, 4 Term Rep. 353, though the distinction [\*453] was taken \*with respect to agreements which would constitute a partnership with respect to creditors, though not as between the parties themselves. But there the parties had expressly stipulated between themselves not to be answerable for each other's losses, which showed that their intention was not to become partners. Here there was no such stipulation, and therefore no such intention can be inferred; and then, by the general operation of law upon their agreement, they were constituted partners.

Lord ELLENBOROUGH, C. J.—The distinction taken in *Waugh v. Carver* and others, applies to this case. *Quoad* third persons it was a partnership; for the plaintiff was to share half the profits. But as between themselves it was only an agreement for so much, as a compensation for the plaintiff's trouble, and for lending Robertson his credit.

PER CURIAM.—Rule discharged generally.

WHERE A PARTY HAS NO INTEREST IN THE STOCK OF A COMPANY, AND NONE OF THE RIGHTS AND POWERS OF A PARTNER, BUT IS MERELY IN THE EMPLOYMENT OF THE COPARTNERY, AND IS TO RECEIVE REMUNERATION FOR HIS SERVICES IN PROPORTION TO THE PROFITS OF THE CONCERN, HE IS NOT HELD TO BE A PARTNER, EITHER AS REGARD THE PARTNERS, OR AS REGARD THIRD PARTIES.

## I.—WILKINSON v. FRASIER.

Easter Term, 1803.—E. 4 Esp. 182.

ASSUMPSIT against the defendant, who was the captain of a ship employed in the southern whale fishery, to recover seamen's wages.

The action was brought, and the plaintiff declared on the usual articles

for voyages on that fishery, by which the seamen \*are by their articles to receive a certain share of the produce of the cargo in [\*454] lieu of wages.

The plaintiff proved the articles, which were signed by the plaintiff as a mariner, and by the defendant as captain; the sailing of the vessel on the voyage, and the plaintiff's service; and that the oil of which the cargo was composed had been sold, and produced a certain sum, for the share of which the plaintiff went.

These articles stipulated, on the part of the sailors, that they should proceed on the voyage, do their duty, &c.; and on the part of the captain that the produce of the voyage should be divided in certain proportions, viz., a certain proportion to the owners, a certain proportion to the captain, and the rest to the other officers and seamen. The proportion of a common sailor was a one-hundred and ninetieth part.

*Best*, Serjt. objected: that the action could not be maintained against the captain, who was the present defendant; because the defendant, as well as the plaintiff, was to be paid out of the profits of the voyage, that they were therefore partners; and as one partner could not maintain this action against another, the action was not maintainable.

Lord ALVANLEY said, he would not nonsuit the plaintiff on such an objection: That the plaintiff and the other sailors were hired by the defendant and the owners, to serve on board the ship for wages to be paid to him; and the share was in the nature of wages, unliquidated at the time, but capable of being reduced to a certainty on the sale of the oil, which had taken place; and that he should not therefore consider them as partners, but as entitled to wages to the extent of their proportion in the produce of the voyage.

There was a verdict for the defendant.

\*II.—DRY v. BOSWELL.

[\*455]

Easter Term, 1808.—E. 1 Campb. 329.

ASSUMPSIT for work and labour, and materials in and about the repairs of a lighter. Plea, the general issue.

There was no doubt as to the repairs being done; and the only question was, Whether the defendant was liable for them?

The witnesses first stated, that the lighter was the sole property of a person of the name of Russell; that she was let out by him to the defendant, who worked her, and that the two shared her profits equally between them.

Lord ELLENBOROUGH said, in that case the defendant was to be considered a partner, and was jointly liable for the repairs done to the lighter. There was here a participation of profit and loss, which constituted a partnership.

But the agreement with Russell subsequently appeared to be this, that the defendant in consideration of working the lighter should receive half

her gross earnings, and that Russell as owner should receive the other half.

Lord ELLENBOROUGH observed, that this was only a mode of paying the defendant wages for his labour, and was different from a participation of profit and loss; so that under these circumstances no partnership could be considered as existing between him and the owner of the lighter.

Evidence, however, was afterwards given of the defendant having himself ordered the repairs to be done, and the plaintiff had a verdict.

1. To the case *Dry v. Boswell*, the reporter appends the following note:—*Wish v. Small. Exeter Spring Assizes, 1808.* Action for the price of two bullocks sold by the plaintiff to the defendant. It appeared in evidence that the plaintiff had purchased these bullocks, and afterwards put them to depasture upon the lands of one Woof, it being agreed that the profit to be made upon the [ \*456 ] resale, \*(after they had been fatted upon Woof's land,) above £20, at which the plaintiff then valued them, should be equally divided between him and Woof. Upon this Dampier for the defendant objected, that Wish and Woof were partners, and ought jointly to have brought this action. To this it was answered, that they were merely partners in the profits, and that this was a mode of paying Woof for the pasture. Thompson, B., was of the latter opinion, and the plaintiff had a verdict. In Easter Term following, Dampier moved the Court of King's Bench that the verdict should be set aside, and a nonsuit entered on the foregoing ground; but a rule *nisi* was refused. So if A. is employed by B. to sell goods, and is to have for himself whatever sum he can procure for them beyond a stated sum, this does not constitute a partnership between A. and B. as to these goods, and A. is a competent witness to prove the contract between B. and the person to whom the goods are sold. *Benjamin v. Porteous, 2 H. Bl. 590.*"

2. Mr. Collier, in his work on Partnership, observes, "In order to constitute a communion of profit between the parties, the interest in the profit must be mutual, that is, each person must have a specific interest in the profits as a principal trader. He is not a partner if he merely receives out of the profits a compensation for his trouble in the character of an agent or servant of the concern."—Collier on Partnership, p. 17. On this passage Mr. Justice STORY remarks, "The distinction as thus presented does certainly wear the appearance of no small subtlety and refinement, and scarcely meets the mind in a clear and unambiguous form; for the question must still recur, When may a party properly be said to have an 'interest in the profits as profits?' When, also, may it properly be said, that 'the interest in the profits is mutual,' and that 'each person has a specific interest in the profits as a principal trader?' No absolute test is given to distinguish the cases from each other, and it is not easy to grasp it when stated in so abstract a form. The true meaning of the language, 'an interest in the profits as profits,' (which has probably been borrowed from the subtle and refined statement of an eminent judge,) seems to be, that the party is to participate, directly at least, in the losses as well as in the profits, or, in other words, that he is to share in the net profits, and not in the gross profits. If he is to share in the net profits, which supposes him to have a participation of profit and loss, that will constitute him a partner, if in the gross profits, then it will be otherwise."—Story on Partnership, p. 30.

3. In the case of *Hamper, ex parte, 17 Vesey, p. 403*, Lord ELDON observed, "The cases have gone farther to this nicety, upon a distinction so thin, that I cannot state it as established upon due consideration; that if a trader agrees to [ \*457 ] pay another person for his labour in the concern a sum of \*money, even in proportion to the profits, equal to a certain share, that will not make him a partner; but if he has a specific interest in the profits themselves,



as profits, he is a partner." In the same case his lordship also observed, "It is clearly settled, though I regret it, that if a man stipulates that as the reward of his labour he shall have not a specific interest in the business, but a given sum of money, even in proportion to a given *quantum* of the profits, that will not make him a partner; but if he agrees for a part of the profits as such, giving him a right to an account, though having no property in the capital, he is as to these persons a partner, and in a question with these parties no stipulation can protect him from loss." In *Rowlandson, ex parte*, 1 Rose, 91, Lord ELDON observed, "The ground is settled that if a man as a reward for his labour chooses to stipulate for an interest in the profits of a business, instead of a certain sum proportioned to those profits, he is as to third persons a partner, and no arrangement between the parties themselves can prevent it."

4. In the case of *Langdale, ex parte*, 18 Vesey, p. 300, the question was, Whether there was a partnership between a bankrupt who kept a canteen in the neighborhood of some barracks and the brewers who supplied him with beer, in respect of their participation in the profits of the bankrupt's business, under an agreement between them? By this agreement, according to the representation of the brewers, they were to pay half of his rent, and he was to pay £4, 5s. per barrel for the beer supplied to him, the usual price being £3, 8s. The bankrupt's account of the agreement was, that the brewers were to have out of the profits 17s. per barrel for the half of the rent, the bankrupt taking the rest, of which 5s. was for drawing the beer, and 1s. for collecting the money. Lord ELDON observed, "A man who is to have no profit may be a partner, if holding himself out as such, as by lending his name. He may also be a partner when the contract is that he shall suffer no loss; and I agree that it is not the less a partnership because part of the contract is that they are not to suffer by bad debts, the personal negligence of him who has the custody of the article, by fire, &c. The true criterion is, whether they are to participate in profit. This has been the question ever since the case of *Grace v. Smith*. I cannot refuse to let this case go to a jury. The agreement to sell their beer at a higher price than to others would not make them partners; but the bankrupt's representation is so different that it is impossible to determine without the decision of a jury, upon the question, Whether there was an agreement for a division of the profits, or that the brewers only stood in relation as vendors of the beer to this retailer, at £4, 5s., in consideration of paying half his rent, selling to others at £3, 8s.? If the actual contract give a claim upon the profits, or the application \*of them, that is partnership. If there was no claim upon the profits, [ \*458 ] or the application of them, then it is not partnership."

5. In *Watson, ex parte*, 19 Ves. 461, Lord ELDON observed, "There is a wide distinction between a dormant and a nominal partner. The former is liable in respect of the profits, but one who receives a salary not charged upon profits according to a known but a nice distinction, is not by that a partner; but if retiring from, or coming into the trade he suffer his name to be used, it is of no consequence whether he has a salary, or sum of money to be paid by others, or to be got out of the profits. It is the use of the name that makes him liable as one of the persons by whom and to whom everything is bought and sold."

6. The equity of the principle which makes a person a partner in a question with third parties, although he is not one in a question with the partners themselves, except in the case of a nominal partner, where the party holds himself out to the world as a partner, although not truly such, may well be doubted. The opinion of Mr. Justice STORY was opposed to the equity and policy of such a rule. He observes,—“As an original question it may admit of very great doubt whether it would not have been more convenient and more conformable to true principles, as well as to public policy, to have held that no partnership should be deemed to exist at all, even as to third persons, unless such were the intention of the parties, or unless they had held themselves so out to the public. The ground upon which the participation of the profits of a trade, although no partnership is intended to exist between the parties, shall make them partners as to third persons, is thus stated by Lord Chief-Justice DE GREY, in *Grace v. Smith*, ‘Every man who has a share of the profits of a trade ought also to bear his share of the loss. And if any one takes part of the profits he

takes a part of that fund on which the creditor relies for his payment. If any one advances or lends money to a trader, it is only lent on his general personal security, and yet the lender is generally interested in those profits. He relies on them for repayment.' Now, to say the least of it, this reasoning is very artificial; for if the creditor trusts to the personal security of his debtor generally, for advances made, or goods sold, and he has no lien on the property or profits of the trade for repayment, it seems difficult to perceive why other persons should be liable to him on account of their receipt of a portion of the profits, there being no privity of contract, and no partnership existing in the advances of money or goods sold between the parties. Why should a mere participant in the profits, contrary to the intent of the agreement between himself and his co-contractor, be held responsible to a creditor of the latter, when the latter has trusted to his personal security, and only had a general confidence that he was [ \*459 ] \*doing a profitable business? Why should the creditor's contract displace the contract of the immediate parties? The rule might have some show of equity if the party were only held liable to the extent of the profits received by him. But the rule makes him liable to pay all the losses, and all the debts, whether he has received any profits or not. However, the doctrine is completely established upon the very ground asserted in *Grace v. Smith*."—Story on Partnership, p. 54.

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THE ACT OF ANY ONE PARTNER BINDS THE FIRM IN ALL MATTERS WITHIN THE SCOPE AND OBJECTS OF THE PARTNERSHIP, ALTHOUGH THE ACT MAY BE A FRAUD ON THE FIRM, UNLESS THE PARTY FOUNDING ON THE ACT IS COGNIZANT OF THE FRAUD.

### I.—SWAN v. STEELE.

Feb 7, 1806.—E. 7 East, 209.

IN *assumpsit*, the plaintiffs declared, first, on a bill of exchange, dated 26th of August, 1803, drawn by D. Maitland on Campbell and Co. for £342, payable to the order of the defendants and one George Payne, deceased, three months after date, and indorsed by the defendants and Payne, under the firm of Wood and Payne, to the plaintiffs; and which bill Campbell and Co. had accepted. The plaintiffs also declared for goods sold and delivered, and on the common money counts. The defendant Steele pleaded *non assumpsit*, and the defendant Wood suffered judgment by default. And at the sittings after last Trinity Term at Guildhall, the jury found a verdict for the plaintiffs for £368, 5s. 4d., subject to the opinion of the court on the following case:—

Wood and Payne, mentioned in the pleadings were wholesale grocers in Liverpool, trading under the firm of Wood and Payne, from January, 1802, until January, 1804; with whom the defendant Steele became a partner in May, 1802, and so continued till January, 1804, in the business of buying and selling cotton, which business was also carried on under the same firm of Wood and Payne, and at their counting-house; [ \*460 ] but \*Steele was never interested in the grocery business. Steele took no active part in the cotton concern; nor was it known to the world or to the plaintiffs that he was a partner. The plaintiffs sold

to Wood and Payne, as grocers, a quantity of sugar, for which they gave their acceptance in the firm of Wood and Payne, at four months, due the 11th of October, 1803; and not being able to provide for it when due, Wood and Payne, on the 8th of October, 1803, delivered to the plaintiffs the bill mentioned in the declaration due the 29th of November, with others, to provide for that acceptance; and the said bill was indorsed by either Wood or Payne, in the firm of Wood and Payne, without the actual knowledge of Steele, as all other bills in the cotton concern were. The said bill had been paid to Wood and Payne as cotton dealers, by the drawer thereof, for cotton sold to him, in which Steele was as aforesaid interested; and the name "D. Maitland" thereto subscribed as the drawer, was the hand-writing of D. Maitland of Wigan, to whom the cotton was sold. The said bill has been dishonoured, of which Wood and Payne had due notice. Wood and Payne became bankrupts on the 16th of January, 1804, and the effects of the said cotton concern are insufficient to discharge its debts; and Steele when he has discharged those debts will be a creditor of the concern. The question for the opinion of the court was, whether the plaintiffs were entitled to recover? If they were, then the verdict was to stand, otherwise a verdict was to be entered for the defendant Steele.

*Wood* for the plaintiffs.—Wood and Payne being partners with Steele, had authority to dispose of the partnership effects for such purposes as they thought proper. One partner may negotiate or indorse bills without the other; so he may sell the partnership effects, or release partnership debts. And he is only liable to his partners for misapplication of the funds; but it is a good disposition as to third persons, unless they collude with one to defraud another partner; and no fraud is imputed here. The court then desired to hear the other side.

*Littledale*, contra, said, that the bill in question was not \*taken originally as payment for the goods in the usual course of [\*461] trade, but was afterwards received by the plaintiffs as collateral security for the payment of Wood and Payne's own acceptance. It was therefore given by the two partners as a pledge, and not as payment; and one partner has no authority to pledge the goods or securities of another. The only difference between this case and that of *Shirreff v. Wilks*, 1 East's Rep. 48, is, that there the creditor, when he accepted the security from one of the partners for his particular debt, knew that it was part of the partnership funds. [Lord ELLENBOROUGH.—That makes all the difference.] But whether the creditor acquire that knowledge before or after the acceptance of the bill cannot make any difference in this case, where he seeks to bind the defendant Steele by an implication of law in consequence of the fraudulent act of his partners, not having looked to his security at the time. For no contract can arise by operation of law out of a fraud against an innocent person, because of the ignorance of one of the parties to the contract at the time of the interest of such innocent person. If the plaintiffs' knowledge of Steele's interest in the bill at the time of its indorsement to him would have avoided the indorsement as fraudulent, it is incongruous to say that his coming to the same knowledge subsequently shall give him a new security which he did not before contem-

plate. [LE BLANC, J.—Suppose the bill had been made payable to Wood, Payne, and Steele by name, and Wood had indorsed it in the partnership firm, without the knowledge of Steele, would not that have bound them all, unless the creditor had known that this was done without the knowledge or consent, and in fraud of Steele?] If the creditor received it in payment for the individual debt only of the one partner, he ought perhaps to apply to the other to know if the indorsement were made with his consent, without which he must necessarily know that it was a fraud upon such other partner.

Lord ELLENBOROUGH, C. J.—It would be strange and novel doctrine to hold it necessary for a person receiving a bill of exchange indorsed by one of several partners, to apply to each of the other partners to know [\*462] whether he assented to such indorsement, \*or otherwise that it should be void. There is no doubt that in the absence of all fraud on the part of the indorsee, such indorsement would bind all the partners. There may be partnerships where none of the existing partners have their names in the firm. Third persons may not know who they are; and yet they are all bound by the acts of any of the partners in the name or firm of the partnership. The case is too clear for argument, and I should not have permitted the point to be reserved if I had not understood at the trial that there were some other facts in the case which might raise a doubt. The distinction is well settled, that if a creditor of one of the partners collude with him to take payment or security for his individual debt out of the partnership funds, knowing at the time that it is without the consent of the other partners, it is fraudulent and void; but if it be taken *bona fide* without such knowledge at the time, no subsequently acquired knowledge of the misconduct of the partner in giving such security can disaffirm the act. Now here the three persons were trading under the firm of Wood and Payne, and in the course of their dealings as partners received the bill in question; and when competent to either of them by his indorsement in the name of the firm to pass their interest in the bill; and the plaintiffs, ignorant of any fraud at the time, take it by such indorsement from one of the partners. Then if the interest of the plaintiffs in the bill were once well vested, no subsequent knowledge that such indorsement was made without the consent of one of the partners will divest it. And it would be highly inconvenient that it should; because if the plaintiffs had been apprised at the time that the partner who indorsed the bill had no authority to do so, they might have obtained some other security for their demand.

The other judges all concurred.

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[\*463] \*II.—SANDILANDS v. MARSH.

Trinity Term, 1819.—E. 2 B. and Al. 673.

ASSUMPSIT. The declaration stated that I. Howden, deceased, em-

ployed the defendant as his agent to lay out £4000 in the purchase of an annuity, and to receive the arrears thereof, and that in consideration thereof, and of a certain commission, defendant promised to guarantee the payment of the annuity, and alleged a breach in not having so guaranteed. Plea, general issue. At the trial before Abbott, C. J., at the adjourned sittings at Guildhall, after last Michaelmas Term, it appeared that the defendant, who was a navy agent, had formerly been in partnership with a Mr. Creed, and that the firm of Marsh and Creed had been the navy agents to Mr. Howden. On the 12th September, 1811, Mr. Creed wrote the following letter to Mr. Howden:—"I have an opportunity of employing your remaining property in the stocks for three or four years in a way that will double, or nearly so, the income you derive from that source. It is by annuity of 8 per cent. per annum on three lives, secured on property, the receipts of which pass through our hands, and will be guaranteed by our house, and not redeemable till after three years. The party granting the annuity is in the receipt of a clear unincumbered income of above £12,000 per annum, and will, as soon as he can after the lapse of three years, redeem the annuity, so that your capital remains untouched. For our trouble in the business, and for guaranteeing the punctual half-yearly payment of the annuity to you, we should expect a commission of 5 per cent., but the benefit you would derive from the arrangement would very well allow of it. Windsor's and this annuity would soon clear off the advance on our account, and leave your income materially improved. If you see this business in the light I do, and will say aye or no by return of post, I will either go on with it, and send you down a bank power for sale of your stock, or else secure it for some other friend." This letter was signed Richard Creed. Howden immediately accepted this offer, and a joint power of attorney was transmitted, empowering Marsh and Creed to sell the stock; and the stock was accordingly \*sold out on the 7th January, 1812. [\*464] On the 23d January, 1813, the annuity in question was purchased of Mr Joshua Rowe, and after having been paid for about two years, became in arrear. Howden died 7th March, 1813. By a letter dated 10th April, 1813, signed Marsh and Creed, in answer to an application made on the part of Mr. Howden's representatives, they stated in substance as follows:—"He has two annuities, one yielding a clear £400 per annum, payable quarterly, exclusive of the amount of the annual premium on the insurance of the life of Mr. Rowe, the granter, at the Equitable Insurance Office, and the purchase-money for which was £4000 in place of £5000, which we informed Mr. Howden we should give for it. This is guaranteed by our house on a commission; and is not determinable for three years." Neither of the above letters were entered in Marsh and Creed's letter-book, nor did it appear that Marsh had personally any knowledge of the guarantee. It was proved, that it was no part of the ordinary business of navy agents to deal in annuities. The charge of 5 per cent. commission had never been made, but only 2½ per cent., the usual commission of navy agents, had been charged in the different accounts transmitted by Marsh and Creed. In those accounts, however, there were found several items, referring to the sale of the stock and the

receipt of the annuity. Under these circumstances, it was contended, first, that this guarantee by Creed could not bind his partner Marsh; and, secondly, that if it could, it was a security which ought to have been enrolled under the provisions of the Annuity Act. The learned judge overruled these objections, and left it to the jury to say, whether under the circumstances of the case, Marsh was cognizant of the transaction as to the purchase of this annuity, although he might be ignorant of the facts of the guarantee itself, telling them that in that case he thought the defendant was liable. The jury found this fact in the affirmative, and the plaintiffs obtained a verdict. The defendant had liberty to move to enter a nonsuit on both points; and a rule *nisi* to that effect having been obtained by Marryat in last Hilary Term,

*Scarlett and Adams* now showed cause.—They contended that the case had been properly left to the jury to say, whether \*Marsh [\*465] was or was not cognizant of the transaction; and the jury have found that he was. If so, he must be bound by the representations and acts of his partner in it. As to the second point, the distinction is, that only those securities which come from the grantee or his sureties are required to be registered; but this guarantee was wholly independent of, and for anything that appears, unknown to the granter. He was not in any degree responsible over either to Marsh or Creed, in case they were called upon by Howden to pay the annuity. Then it did not require to be memorialized, because the only object of the act was for the further protection of the granter, to record all the securities coming directly or indirectly from him.

*Marryat and Wilde*, contra.—One partner has no power to bind another by a guarantee of this sort. It was not an act done in the ordinary course of business, and its operation might last beyond the duration of the partnership, or even the life of the parties. There is no pretence for saying that Marsh was cognizant of the circumstances of the guarantee itself. The letters containing it were never entered in the letter-book of the firm; and the mere receipt of the 2½ per cent. on the money, which was the consideration for the annuity, is not sufficient of itself to charge him with this guarantee. The 5 per cent., which was the consideration for it, never was received at all. All Marsh's acts are perfectly consistent with the ordinary course of dealing and no more. The case of *Duncan v. Lowndes and Another*, 3 Camp. 478 is precisely in point. But supposing it to be a guarantee binding on Marsh, still the plaintiff cannot recover, not having complied with the Annuity Act. It would defeat all the provisions of that act, if this did not require to be memorialized; a person meaning to grant an annuity would then only have to guarantee an annuity granted by a pauper in order to evade the act. The case of *Rosher v. Hurdis*, 5 T. R. 678, shows, however, that this is not the law. But there is another objection. The guarantee, at all events, depends upon the second letter alone, for there is nothing to connect the first and second letters together. The price is different, and they relate to different annuities. If so, then inasmuch as the [\*466] second letter only states that a guarantee has \*been given, but omits the terms of the guarantee, it is not sufficient to take the

case out of the Statute of Frauds. [ABBOTT, C. J.—Can it be contended, that if a person writes a letter offering to purchase an annuity, and to guarantee its payment, and requesting a power to sell out stock to be sent for that purpose, that he will not, after his proposal has been acceded to, and the stock has been sold out, be liable to make good his guarantee, because exactly the same annuity as that proposed has not been bought?] The question is not whether he would not be bound to make compensation, but whether he would be liable on the guarantee. The second letter admits that a guarantee was given, but is wholly silent as to its terms. *Wain v. Warlters*, 5 East, 10.

ABBOTT, C. J.—This case has been very fully and ably discussed at the bar; but I am of opinion that the rule must be discharged. Two material questions have been made; the first of which, and the most important and extensive in its consequences is, Whether this defendant shall be held to be bound by the guarantee given without his knowledge by his partner, Creed? and if the verdict of the jury, finding him to be so bound, be not sustainable, it will be very dangerous hereafter to deal with a partnership; for the business in each department of a firm is generally transacted by one partner only. It has, undoubtedly, been held, that in a matter wholly unconnected with the partnership, one partner cannot bind the others. But the true construction of the rule is this, that the act and assurance of one partner, made with reference to business transacted by the firm, will bind all the partners. In this case, the proper business of Marsh and Creed was to receive the money due from the navy board to their customers, and their dividends in the public funds, upon which business they charged Howden with a commission of  $2\frac{1}{2}$  per cent. It was no part of their ordinary business, to guarantee annuities, or to lay out the money of their customers in the purchase of them. Under these circumstances, the original proposal was made by Creed, in answer to which the joint power of attorney was transmitted to Marsh and Creed, under which the stock was afterwards sold. Now that sale must have appeared in the partnership books; and if \*that fact were doubtful, it is proved by the balance stated in the accounts transmitted by the partnership; that sale, therefore, [\*467] and the fact that the proceeds had been laid out in the purchase of an annuity, either were actually known, or ought to have been known, by Marsh. Now, if that whole transaction was known to him, the guarantee, which is connected with it, becomes, in point of law, an assurance made by one partner with reference to business transacted by both; and, according to the rule previously stated, it will bind both. To illustrate this position, a case may be put, where two persons in partnership for the sale of horses, should agree between themselves never to warrant any horse; yet, though this be their course of business, there is no doubt that if, upon the sale of a horse, the property of the partnership, one of them should give a warranty, the other would be thereby bound. As to the second question, Whether this guarantee ought to have been enrolled according to the provisions of the Annuity Act? I agree that that statute ought not to receive a narrow construction, so far as the interest of the granter of the annuity is concerned. Every security,

therefore, given by him or on his behalf, and for which the money received by him is the consideration, must be enrolled. But the consideration for this promise is wholly distinct from that given for the annuity. It is the payment of an additional commission of  $2\frac{1}{2}$  per cent.; whereas the consideration for the annuity is the sum of £4000. It is wholly unconnected with the granter, and collateral to his interest, and does not, I think, require to be enrolled. I am, therefore, of opinion, on both grounds, that this rule should be discharged.

BAYLEY, J.—I have entertained considerable doubts, during the discussion of this case, but I am now entirely satisfied on both points. It is true that one partner cannot bind another out of the regular course of dealing by the firm. But where the assurance has reference to business transacted by the partnership, although out of the regular course, it is still within the scope of his authority, and will bind the firm. Now if we apply that rule to this case, we find a proposal by Creed, concerning business to be transacted by the house, in which he states the terms on [\*468] which it will be done. This proposal is \*acceded to, and the business, as appears by the accounts transmitted, is transacted by the house. If so, it must have been transacted on the terms stated in the letter of Creed; and, if Marsh and Creed were thus agents in laying out Howden's money in the annuity, they must be bound by the terms specified by Creed. For this is a representation made by one partner as to the terms upon which the business is to be done by the firm. This is made still more clear by the letter of the 10th April, 1813. It is suggested, indeed, that this may have reference to some other guarantee than that of the letter of 12th September, 1811. But if so, it was for the defendant to have proved that fact. Then it is contended, that the second letter by the firm does not specify the amount of the commission, and that this case falls within *Wain v. Warlters*. But that difficulty is removed, by connecting it with the former letter, in which the terms are specified. The stamp acts proceed on the same principle, that an agreement may be inferred from several letters; and therefore direct that the stamping of one shall be sufficient. The other question is, Whether this guarantee ought to have been enrolled? The case of *Rosher v. Hurdis* does not in terms show whether the security there was not given at the instance of the granter. And there is a material difference between sureties for a granter who are identified with him, and other persons wholly unconnected with him. If in this case Rowe had been told that Marsh and Creed were to be his guarantees, and he had given them any consideration for so doing, the case would be different. But here these parties guarantee, not at the instance of the granter, but of the grantee. I am of opinion that this is not within either the terms or the spirit of the Annuity Act.

HOLROYD, J.—I am of the same opinion. It was properly left to the jury to say whether Marsh was cognizant of the contract to lay out this money in the purchase of an annuity; and then whatever engagements Creed might make with reference to it would bind Marsh; for, by his knowledge of it being found by the jury, it becomes for this purpose part of the partnership business, as much as any transaction in the ordi-



nary course of dealing. The first letter seems to me to be \*applicable to any annuity to be purchased with the money to be raised by sale of the funded property; and that the parties themselves so considered it appears from the second letter. We have, therefore, a right to connect these two letters together, and by so doing, the objection, that the terms of the guarantee are not specified in the second letter, is removed. The great difficulty in my mind is as to the enrolment, and it arises from this guarantee having been originally mentioned as one of the terms upon which the grantee was to advance his money. It does not, however, appear that the granter had any knowledge of it, and that makes a material difference. For there being nothing in the letter which imports that the terms of the proposal came from the granter, it may be considered as wholly collateral to the transaction, and as no part of the condition on which the annuity was granted by him. The words of the act are, "that a memorial of every deed, &c., whereby any annuity shall be granted, shall be enrolled;" and the warrants of attorney, of which the act subsequently speaks, are those given by the granter. I think, therefore, that the assurances meant in this clause are those connected with the granter; and that as this guarantee was wholly unconnected with him, it did not require to be enrolled.

BEST, J.—I am clearly of the same opinion on both points. If we were to decide the first point in favour of the defendant, we should place persons who have occasion to deal with partnerships in a new and difficult situation; for unless they made inquiry from every one of the partners whether they assented to the partnership transaction, which in many cases would be impossible, they would have the security of the individual only, and not that of the firm. In this case it appears that Marsh and Creed acted not merely as navy agents, but also in the procuring of this annuity, and that they have received an advantage from the transaction. For although it is said they did not receive the 5 per cent. commission, yet at all events they were benefited by receiving 2½ per cent. commission on a larger sum arising from this annuity. Marsh, therefore, who has derived an advantage from the engagement entered into by his partner, must be bound by the consequences of it. This question, \*therefore, was properly left to the jury, who have, in my opinion, found the right verdict. As to the second point, it seems to me that the object of the Annuity Act was to protect inexperienced persons from the frauds of those who lent money on annuities; and the provision for the enrolment of the securities being intended for the benefit of the granter only, I think it is necessary to enrol those securities alone, which show the extent of his responsibility. Now that was necessary in *Rosher v. Hurdis*; for it may be concluded (though it is not expressly so stated in that case) that the granter was there liable over to the obligor of the bond. But here there is no such liability on the part of Rowe to Marsh and Creed. I am therefore of opinion, that it was not necessary to enrol this guarantee, and that on both grounds this rule must be discharged.

Rule discharged.

## III.—EX PARTE BONBONUS.

June 15, 1803. 3 Ves. 540.

JAMES ROGERS carried on business as a merchant at Bristol on his separate account, under the firm of James Rogers, and also of James Rogers and Co. He was also engaged in partnership with Blake and Purnell as insurance brokers; which partnership was also carried on in Bristol. The private trade of Rogers was carried on under his sole management, in a dwelling house and counting houses adjoining in Queen Square and Princes Street, distinct from the partnership concern, which was carried on in the Exchange Buildings, under the immediate control of Purnell, the cashier, who paid and received all moneys whatsoever due to and from the partnership, and in distinct books of account.

On the 22d of March, 1795, a separate commission of bankrupt issued against Rogers. Under that commission Attwood and Co., bankers at Bath, proved a debt of £30,725 for money advanced upon his drafts.

[\*471] \*On the same 22d of March a joint commission of bankrupt issued against the partnership of Rogers, Blake, and Purnell. Under that commission Attwood and Co. proved a debt of £27,011, 13s., for money advanced upon sixteen notes, drafts, or bills.

The petition presented by the joint creditors stated, that the debt proved under the joint commission is part of the debt proved under the separate commission; and in consequence of Rogers having given, indorsed, or subscribed, the partnership firm to several of the bills, &c., which were the foundation of the separate debt; and that he was at the time of his bankruptcy indebted to the partnership firm to the amount of £6000. Rogers died in 1801, having never, though called upon, produced an account of his dealings with Attwood and Co. The petition suggested, that all the said bills or notes except two were drawn by Rogers, or by his direction, without the privity of Purnell; and that they were all made at the same time, though bearing different dates, in the short space from the 3d of December, 1792, to the 25th of February, 1793, though to an extent of £30,000 and upwards; and though Rogers for several months previous to the 3d of December, 1792, and up to his bankruptcy, was not only greatly embarrassed, and threatened by creditors, but was in fact arrested for considerable sums; and that no part of the consideration came to the hands of Purnell, or was applied to the use of the partnership; but that it came exclusively to Rogers. The petition prayed, that the proof of Attwood and Co. under the joint commission may be expunged; that they may refund the dividends received; and an account of their dealings with Rogers.

Mr. Piggott, Mr. Romilly, and Mr. Cullen, in support of the petition contended, that it had been long settled in bankruptcy, that the creditor could not prove against the joint estate, and also against the separate estate of one partner; but must elect, though there are distinct securities; and they referred to *Ex parte Clowes*, 2 Bro. C. C. 595; 1 Cooke's Bank. Law, 258, 8th edit. by Mr. Roots, 534; and the other cases collected by Mr. Cooke, 1 Cooke's Bank. Law, 257, 8th edit. 534.

\*They also insisted upon another point; that one partner could not bind the partnership without authority to a demand, the consideration for which was received by that partner only; and never reached the partnership funds. Upon this point they cited *Ex parte Peele*, and *Hope v. Cust*, before Lord Mansfield. [\*472]

Mr. *Mansfield* and Mr. *Richards*, contra.

The LORD CHANCELLOR.—This petition is presented upon a principle, which it is very difficult to maintain; that if a partner for his own accommodation pledges the partnership, as the money comes to the account of the single partner only, the partnership is not bound. I cannot accede to that. I agree, if it is manifest to the persons advancing money, that it is upon the separate account, and so, that it is against good faith, that he should pledge the partnership, then they should show, that he had authority to bind the partnership. But if it is in the ordinary course of commercial transactions, as upon discount it would be monstrous to hold, that, a man borrowing money upon a bill of exchange, pledging the partnership, without any knowledge in the bankers, that it is a separate transaction, merely because that money is all carried into the books of the individual, therefore the partnership should not be bound. No case has gone that length. It was doubted whether *Hope v. Cust* was not carried too far, yet that does not reach this transaction; nor *Shirreff v. Wilks*; as to which I agree with Lord Kenyon, that, as partners, whether they expressly provide against it in their articles, (as they generally do, though unnecessarily,) or not, do not act with good faith, when pledging the partnership property for the debt of the individual, so it is a fraud in the person taking that pledge for his separate debt.

The question of fact, whether this was fair matter of discount, or, being an antecedent, separate debt of Rogers, the discount was obtained merely for the purpose of paying that debt by the application of the partnership funds, which question is brought forward by the affidavits, though not by the petition, must lead to farther examination. If the partners are privy and silent, permitting him to go on dealing in this way, without \*giving notice, the question will be, whether subsequent approbation is not for this purpose equivalent to previous [\*473] consent. Purnell, therefore, must explain himself upon this; for if he admits all these circumstances to have been in his knowledge, it will be very difficult to say, he is entitled to the benefit of that principle, which is established for the safety of partners. That explanation, if material in 1793, is much more so now: when one of the partners is dead, another gone abroad, the managing clerk dead. Under these circumstances, if the examination as to the propriety of the proof made in 1793, which I consider a sort of judgment for the debt, cannot be gone into but under most unfavourable circumstances to those who made it, I cannot throw that difficulty upon those who came forward then; and permit the inattention of the others, who might have come forward at any time since, to be prejudicial to third persons.

The LORD CHANCELLOR.—Upon general principles it would be too dangerous to permit Purnell now to make an affidavit. This petition represents, that the whole consideration for the bills, under which this

proof was made, came exclusively to Rogers. In a variety of cases that circumstance alone, though to be attended to, will not decide that the other partners are not to be bound; and accordingly there is this distinct and necessary allegation, that the several transactions relative to this debt took place without the privity or knowledge of Purnell; though the insurance trade was carried on in a very public place in Bristol; and that no part of the consideration came to his hands, or was applied to the use of the partnership.

In Fordyce's case, *Hope v. Cust*, Lord Thurlow and the judges had a great deal of conversation upon the law; and they doubted, upon the danger of placing every man with whom the paper of a partnership is pledged, at the mercy of one of the partners with reference to the account he may afterwards give of the transaction. There is no doubt now the law has taken this course; that if, under the circumstances, the party taking the paper can be considered as being advertised in the nature of the transaction, that it was not intended to be a partnership proceeding, [\*474] as if it was for an antecedent debt, *\*prima facie* it will not bind them; but it will, if you can show previous authority or subsequent approbation: a strong case of subsequent approbation raising an inference of previous positive authority. In many cases of partnership and different private concerns it is frequently necessary for the salvation of the partnership that the private demand of one partner should be satisfied at the moment; for the ruin of one partner would spread to the others, who would rather let him liberate himself by dealing with the firm. The nature of the subsequent transactions, therefore, must be looked to, as well as that at the time. It is impossible now to forget, whatever I might have thought of it in 1793, that the only person upon whose evidence this joint demand could be cut down is Purnell the bankrupt, who could not be a witness at law; whose duty also it was to protect the partnership against this proof; and who has permitted it to stand all this time; and who, upon all the circumstances appearing in these affidavits, if he should deny notice, could not be believed by a jury.

Upon the question, whether the proof ought to stand as a debt against both the joint and the separate estates, in 1786 the point was much discussed, with reference to the arrangement, where a commission was taken out against three or more, and there were, not only a partnership of all, and separate creditors of each, but also a partnership of two or three of them. The case was new; but Lord Thurlow held, that under the commission against all, orders might be made for satisfaction, not only of the joint creditors of all, and the separate creditors of each, but also of the partnerships of two or three of them; *Ex parte Marlin*, 3 Bro. C. C. 15. That it should be so is perfectly right; for if there are inferior partnerships between some of the partners, the commission taken out against all is the only legal commission that can exist against one or more. There is considerable difficulty in point of law at this day in supporting this species of paper. In *Mainwaring v. Newman*, 2 Bos. and Pul. 120, upon such a transfer of paper it was held that no action would lie. Finding it, however, treated as a ground of dividend I should not do right in disturbing it. The case in *Livesay's Bankruptcy*, *Ex parte Clowes*, 1

Cooke's Bank. Law, 258, 2 Bro. C. C. 595, does not decide that there should \*not be a sort of double proof, but the creditor must elect. [\*475] That case turned upon the particular circumstances. The question was, whether as to the sum for which the creditor had the bond of the two, he should, under an agreement by all the partners to consolidate the funds, be considered as creditor of both partnerships. The answer to that is, that, when the general partnership agreed to take upon them the demand of the individuals and the other partnership, one term implied was, that their creditors should consent to be creditors of the general partnership only. It was held, therefore, that they must elect. There have been many cases, particularly in the bankruptcy of Burton, Forbes, and Gregory, where three or more partners, being also concerned in other trades, the paper of one firm was given to the creditors of another, and they were permitted to take dividends from both estates; *Ex parte Wenslay*, 2 Ves. and Bea. 254. That, therefore, takes it out of the general doctrine; but it is not necessary to decide that point, especially if it is to affect the doctrine that has obtained in other cases, upon a petition containing no allegation upon that point.

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In the ordinary case the granting a guarantee by one partner in the name of the firm will not bind the firm for such an act, is not a necessary or natural incident of a partnership. Accordingly, in *Duncan v. Lowndes and Bateman*, 3 Camp. 478, in an action on a guarantee for the debt of a third person, signed by one of two partners, with the partnership firm, it was held necessary to give some evidence beyond the relationship of partners subsisting between them, that the partner who signed had authority to bind the other by guarantee. Lord ELLENBOROUGH observed, "As it is not usual for merchants in the common course of business to give collateral engagements of this sort, I think you must prove that Lowndes had authority from Bateman, the other partner, to sign the partnership firm to the guarantee in question. It is not incidental to the general power of a partner to bind his co-partners by such an instrument." On it being objected that the other partner Bateman could only be rendered \*liable [\*476] by a note in writing, Lord ELLENBOROUGH observed,—“All that the plaintiff has to prove is Lowndes's authority to sign the partnership firm to the guarantee. When that is established there is a very good note in writing to bind both partners. For this purpose, I think a subsequent recognition by Bateman may be given in evidence, as well as a prior command; and either the one or the other may be shown by parol as well as by a written document. Proof of a previous course of dealing in which such guarantees were given, and to which both partners were privy, I think, would be sufficient.”

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A COPARTNERY IS LIABLE FOR THE FRAUDULENT ACTS, AND IS BOUND BY THE FALSE REPRESENTATIONS OF ANY OF THE PARTNERS.

### I.—WILLET v. CHAMBERS.

May 23, 1778.—E. 2 Cowper, 814.

THIS was an action for money had and received to the plaintiff's use,

brought against the defendant as surviving partner of one Dadley. Plea, non-assumpsit. Verdict for the plaintiff, damages £480.

Upon a rule to show cause why a new trial should not be granted, the facts appeared to be as follow:—That prior to any partnership between the defendant and Dadley, who was an attorney and conveyancer at Coventry, the latter, in the year 1771, received of a Mr. Bindley, the sum of £350 to be laid out on a real security; Dadley accordingly furnished him with a mortgage from a Mr. Hughes to that amount; which, as it afterwards appeared, Dadley had forged. At midsummer, 1776, Dadley and Chambers entered into partnership: shortly after which Bindley wanted to call in his money. The pretended mortgager was supposed at the same time to want a further sum of £150, which, added to the original mortgage money, made together the sum of £500. The plaintiff Willet was ready to advance this sum; and, in consideration of [\*477] his doing so, an assignment was made to him of the pretended \*mortgage, before made to Bindley. As to £180, part of this sum of £500, Willet paid it into Dadley's office, to Chambers, who gave the following receipt for it:—"Received of Mr. Benjamin Willet the sum of £180, for which I promise to account to him on demand.—CHAMBERS." Dadley was not at home when this sum was paid. Some time after the plaintiff called at the office to pay £300 more, part of the remaining £320 due. Dadley being then at home Willet paid the money to him; and in return Dadley gave him the following receipt:—"Received on account of Mr. Benjamin Willet £300; the remainder of the money to be paid being £20.—DADLEY." It was admitted, that the defendant Chambers was in no respect privy to the forgery, and that no procuration money was paid, either to Chambers or Dadley.

Serjeant *Hill* and Mr. *Green*, who showed cause, argued that this was not distinguishable from the common case of a surviving partner, who is always liable to partnership debts.

Mr. *Wallace*, Mr. *Newnham*, Mr. *Dunning*, and Mr. *Wheeler*, contra, in support of the rule, contended, that this transaction was not within the compass of the partnership, which was for the purpose of carrying on the business of attorneys only, not that of scriveners. A money scrivener is a person who receives money for the purpose of deriving some advantage from the receipt of it. But a mere conveyancer, as such, is by no means a money scrivener. His business is only to draw deeds and writings for the transfer of property from one man to another; and his profit arises from his bill of fees and charges for so doing. The two branches, therefore, though it may happen that they are sometimes exercised by the same person, are in themselves totally distinct and separate. If so, the fact of their being united in the partnership carried on between the defendant and Dadley, ought to have been proved; whereas the reverse is the truth of the case. For it is admitted they took no procuration money, and there is no evidence of any profit from the money in their hands. On the contrary, all that Chambers received was punctually paid over to Bindley; that alone, therefore, would be an answer to [\*478] the present \*demand. The receipts they gave were separate, not "for partner and self;" but "for which I promise to account."

In short, the whole of the transaction was entirely foreign to the partnership, and what each did, plainly showed he considered the part he took in it, as his own separate act and deed only. Therefore, they prayed the rule might be made absolute.

LORD MANSFIELD.—Both parties in this case undoubtedly are innocent; and the loss that will fall upon the defendant, if the law is against him, will be much greater than that which will be sustained by the plaintiff if he fails. It is indeed so hard a case upon the defendant, that every leaning of the court would be in his favour. But the question is, “Whether, in point of law, this engagement with Dudley does not make Chambers answerable?”

To go by steps. It is necessary to see what the business was which Dudley carried on alone before his connection with the defendant in the year 1776. By admission of the counsel on both sides, it was the business of an attorney and conveyancer. By proof in the cause, it appears to have been a great deal more. For he had many appointments, though the nature of them is not particularly mentioned. He had also agencies, and was clerk to a navigation. But there is no pretence that he ever received procuration money. The business of conveyancing, in the very nature of it, as carried on in the country, is this, Where there is an attorney or counsel of credit they receive money to place out upon securities; and persons who want to borrow, as well as those who want to lend, apply to them for that purpose. Their profit arises from having the money in their hands before it is laid out upon the intended securities, and from their fees and bill of charges upon the conveyances they draw. It is not disputed but that this was the nature of Dudley’s conveyancing business. He did not act, however, as a scrivener, who sometimes does not touch the money, but who in all cases gets procuration money. There is no proof of any transaction of that kind; nor, indeed, is it customary for attorneys like him to do so; for they get profit enough without it. I remember a case before me of a person who was trusted to the amount of many thousand pounds, \*in the manner I have [479] stated, and that is the nature of the business.

This was the business of Dudley before the partnership. Let us see, then, what was the nature of the partnership afterwards entered into between Dudley and the present defendant; whether it was a general partnership in all Dudley’s business, or confined to one particular branch of it only; for to be sure, there may be such a confined partnership. The evidence as to this point consists in the heads and terms of an agreement entered into between them, which were afterwards extended and reduced into form. From them it appears there was no particular restriction; it was not to be confined to suits, nor conveyancing only, but they were to be partners in the business which Mr. Dudley carried on. Each was to be worth a certain sum. The profits are stated at £800. Then it is agreed that a provision shall be made for the family of whichever of them should happen to die first. And then comes the following clause at the end, which, though not taken notice of by the counsel on either side, is very material indeed upon this occasion. My object in examining it particularly was to see whether it contained any restriction. The

clause is this :—" *Note*.—This scheme of partnership is intended to include all Mr. Dadley's present and future practice and appointments, such as agencies, navigation-clerk, &c. ; but not to extend to any public office or place, which may at any future time be given to either of the parties." The only restriction, therefore, is that; or more properly speaking, it is the only exception to this general partnership.

Thus the partnership commences without waiting for articles ; and from that time the business was carried on in partnership. One branch of that business was conveyancing. Incident to conveyancing is the receiving of money to place out upon securities. Receiving it from the lender to advance to the borrower, and acting for both parties respectively. From that the profit arises ; not from procuration money, but from the money lying in their hands before it is placed out ; and when placed out, from the charges and fees for drawing and engrossing the conveyances.

[\*480] \*The facts then are shortly these :—The plaintiff Willett, wanting to place out a sum of £500, applies to the office without making any distinction between the two partners. The first sum he advances is £180. This he pays to Chambers, who gives a general receipt for it, not expressing it to be for Dadley, or for what or whose use ; but making himself accountable for the amount on demand. He receives it therefore as the principal, not as the agent of Dadley. And it is admitted he knew the use, by placing it out upon the security for which it was put into his hands. The next sum, which was £300, is paid by the plaintiff to Dadley, who receives it exactly in the same manner as Chambers did the former sum, as principal, and gives a receipt for it, not as for so much money to be placed out, but as the sum for which he was to be accountable. The two sums together come within £20 of what was wanted upon the security. Afterwards the bill for conveyancing is brought in. Hughes being the original mortgagor, if he had not been a fictitious person, and had wanted a further sum of money upon the assignment, he should have paid the expense of conveyancing. But the bill is brought in to the plaintiff, and made out "debtor to Chambers and Dadley." Chambers receives the money, and gives a receipt for it. In that transaction, therefore, he is clearly considered as a partner, and the transaction itself as a partnership transaction. If Dadley had received procuration money, and that kind of dealing had been excepted out of the articles ; or, if separate accounts had been kept of the money got by these transactions, and it had all been set down to the profits of Dadley only, it might have varied the case ; and Mr. Justice Ashhurst, who tried the cause, would have been very glad to have given a direction in favour of the defendant. He suffers by the rascality of a man who had a very good character. I am very sorry for the defendant ; but upon this evidence I cannot say, but that it is a partnership transaction.

Mr. *Newnham* informed the court, that the bill included other business as well as the particular transaction of the mortgage.

[\*481] \*Lord MANSFIELD said, that proves nothing, but that in general they were partners in the fees of conveyancing.

PER CURIAM.—Rule for a new trial discharged.



## II.—RAPP v. LATHAM.

June 30, 1819.—E. 2 B. &amp; AL. 795.

ACTION for money had and received. Plea, first general issue; secondly, set-off. This action was brought by order of the lord chancellor against the defendants, who were bankrupts, and was defended by the assignees. The question was, Whether the plaintiff was entitled to prove any, and what debt, under the commission? The two defendants were in partnership as wine and spirit merchants. The business was under the sole direction and management of Parry; Latham being also an insurance broker. The plaintiff employed the defendants to purchase wine for him on commission, and to resell the same as opportunity might offer. The plaintiff advanced the money to pay for the wines, and the duties thereon. The defendant Parry represented to the plaintiff that wines were actually purchased and sold, and from time to time rendered in the name of Latham and Parry accounts of such sales, and paid the proceeds thereof to the plaintiff. These dealings commenced in January, 1812. Parry then wrote to the plaintiff that he had an opportunity of purchasing 61 pipes of port at £65 per pipe, and he desired the plaintiff to remit the money to pay the price of such wines and the duties thereon; the plaintiff did remit the money, and Parry represented that he made the purchase, and afterward, in the name of the firm, transmitted an account to the plaintiff, stating that 30 of these 61 pipes were resold at the price of £84 per pipe, and paid the proceeds of such pretended sale to the plaintiff. The other transactions were similar to this, and continued from January, \*1812 to 1813; during that time [482] Parry represented that eleven different purchases of wine had been made. Each transaction formed the subject of a separate account, and all the purchases were described as being made at a certain specified rate per pipe. The plaintiff conceived that Parry was in fact laying out his money in *bona fide* purchases of wines, and that he actually resold part of such wines as he represented; but upon the bankruptcy taking place, it appeared that the transactions were wholly fictitious; and that Parry had had recourse to them as expedients to raise money. The defendant Latham knew that the plaintiff had employed Parry to buy and sell wines on commission, but he had no knowledge that the transactions were fictitious. Upon the whole account the plaintiff had advanced, on account of the alleged purchases of wine, and some other purchases of rum, about which there was no question, £126,000, and he had received, on account of the supposed resale of part of the wines and the profits thereon, £130,000. He claimed to recover the money he had advanced for the purchase of that part of the wine which the defendant Parry had represented as purchased, and which they had never in fact delivered or resold. The cause was tried at the London sittings after last Hilary Term, before Abbott, C. J., and it was contended by the plaintiff that he had a right to take each transaction separately, and to charge the defendants with the amount of the money advanced to them, for the purchase of every pipe of wine not accounted for.

The lord chief-justice was of opinion, that in this action for money had and received, the plaintiff could not recover, as the defendants had in fact received no money beyond what they had actually paid to the plaintiff, and the plaintiff was therefore nonsuited, with liberty to move to enter a verdict for such sum as an arbitrator should award, on a principle to be laid down by the court. A rule *nisi* having been obtained for that purpose by Scarlett in Easter Term last, cause was shown on a former day in this term by

*Vaughan*, Serjt., *Gurney* and *Littledale* for the defendants.—If the defendant Latham had even been privy to the \*fraud of Parry, [\*483] this action for money had and received is not maintainable, for it does not lie, unless money actually pass between the parties. If there be only money's worth, or if by mistake or fraud a man represent that he has received money, and it afterwards appear upon the evidence that money was not received, this is not the proper form of action. Now here no money has come into the hands of the defendants beyond what they have paid, and that being so this action is not maintainable. Secondly, although it be true, that one partner is liable for the fraudulent acts of another, that rule must be confined to real transactions, for such only are in the ordinary course of trade, and are to be considered as partnership transactions. The principle upon which one partner has been held bound by the acts of another, is, that he gives that other an implied authority to bind him in all partnership transactions, and therefore it has been held that if one partner be dissatisfied with the conduct of another, and give notice to the parties who are trusting that other not to trust him, he is not liable, *Willis v. Dyson*, 1 Starkie, 164. But here there is no partnership transaction. These fictitious purchases and sales are not in the ordinary course of trade, they are not therefore partnership transactions, with respect to which alone one partner has an implied authority to bind another. There is no instance in the books where one partner has been held bound by the acts of another, where the transaction is not a real transaction. There are instances as to the accepting of bills, receiving goods or money; but these are all real transactions. Where a partner represents that he has bought and sold goods, and where it is only a transaction existing in his own mind, when planning a fraud, there is no authority which says that his partner is bound. [HOLROYD, J.—Suppose there was only one transaction, viz., an advance of £5000, a return of money for wine resold at a profit of £2000, and that £7000 were accordingly given in return for the £5000 received as if it were a real transaction, and that Latham afterwards discovers it to be fictitious. Latham and Parry could not then treat it as a loan, and bring an action to recover back as much as the sum they had paid exceeded the money advanced to them with interest, and if they could not, [\*484] then there was no debt due to Latham and \*Parry, and consequently no part of it could be applied to subsequent transactions.]

*Scarlett*, *Marryat*, and *Tindal*, contra.—It is well established that an innocent partner is liable for the fraudulent acts of another. In *Willet v. Chambers*, 2 Cowper, 814, there was a partnership between two conveyancers in the country, and money had been received partly

by one and partly by the other, to be laid out upon a mortgage; the mortgage was forged by one of the partners without the knowledge of the other, still it was held that the innocent partner was liable to repay the money. In *Jacaud v. French*, 12 East, 317, the same principle was recognised; and in *Bond v. Gibson and Jephson*, 1 Campb. 185, one of two partners, with the intention of cheating the other, purchased articles such as might be used in the business, which he instantly converted to his own separate use. Lord Ellenborough held, there being no collusion between him and the seller, that this was to be considered as a partnership transaction, and that the innocent party was liable for the price of the goods, without proof of any previous dealing between the parties. Now, here the defendant Parry has received money as the price of a certain number of pipes of wine, which he alleges he has purchased; he afterwards represents that he has sold a part of these wines at a profit, and pays the proceeds of such sale to the plaintiff; he is still bound to account for the residue: the money paid into his hands as the price of the residue of those wines, is money had and received to the plaintiff's use, and then this being a partnership transaction, Latham is liable for the acts of his partner; the plaintiff seeks only to recover money specifically paid by him to the defendants to purchase specific wines, which they represented they had purchased for him, and which they had not. It is money advanced, therefore, upon a consideration which has failed; but it is said that the defendants are entitled to deduct from the money advanced by the plaintiff for the purchase of those wines, those payments which were made by them in respect of profits which they represented as having been made upon the sale of part of the wines; or in other words, they are entitled to consider the plaintiff's advances as a loan of money, and the \*payments made by them specifically as profits, [\*485] as a repayment of part of the principal advanced to them; the consequence of this would be, that if the plaintiff had received a sum of £6000 on the account of profits, he would be bound at the end of one or even of five years, to refund the same, because the defendants, or one of them, had imposed upon him as to those profits. This, indeed, would be applying payments which had been made upon one account to another. These transactions are not to be considered as forming one account in the aggregate, for the defendants themselves have separated them, and have rendered an account of what was sold and what not; besides, it is not a purchase of a gross parcel of goods at a gross sum of money, but a purchase of a certain number of pipes of wines, at a specific price per pipe, and the plaintiff is entitled to recover the sum he had advanced for the price of every pipe of wine not actually purchased.

*Cur. adv. vult.*

ABBOTT, C. J., now delivered the judgment of the court.—This case has been so recently argued, that it is not now necessary to state the circumstances of it, and it will be sufficient to observe, that, according to the accounts rendered to the plaintiff, the supposed purchases were all alleged to be made at certain specified rates per pipe or hogshead, so that each transaction if real was divisible in its own nature. Upon consideration of the case, we are of opinion that the defendant Latham is bound

by the acts and representations of his partner Parry, and cannot be allowed to say that those transactions were fictitious, which Parry represented to be real, whether such representations applied to the sale of the whole number of casks supposed to have been purchased at one time, or to a part only of such number. The consequence of this will be, that the plaintiff is entitled to retain, without account, all the money that has been paid to him upon these fictitious transactions, as he would have been if the transactions had been real, and is entitled to recover back the sums advanced for the other supposed purchases, as money advanced by him upon a consideration not performed, and as therefore had and received by the defendant to his use. \*The non-suit, therefore, [486] must be set aside, and a verdict entered for the plaintiff, for the sum which shall be found due upon the principle which I have mentioned, which is the mode most favourable for the plaintiff.

Rule absolute.

WHERE A PARTNER ACTS IN THE NAME OF THE FIRM FOR PURPOSES OF HIS OWN, OR IN VIOLATION OF HIS POWERS AS A PARTNER, HE WILL NOT BIND THE FIRM IN THE CASE OF A PARTY WHO IS COGNIZANT OF HIS SO ACTING.

### I.—HOPE v. CUST.

Mich. Term, 1774.—E. 1 East, 51.

MR. FORDYCE, who traded very largely in his separate capacity as well as in the business of a banker in partnership with others, having considerable dealings in his private capacity with Hope and Co. in Holland, did, for and in the names of himself and partners, give them a general guarantee for the money due from him in his separate capacity. Fordyce became a bankrupt, and afterwards all the partners became bankrupts. And a bill was filed in the court of chancery by Hope and Co., in order to have the benefit of this guarantee; upon which that court directed an issue to try the validity of it.

Lord MANSFIELD, in summing up the evidence to the jury, said, there is no doubt but that the act of every single partner in a transaction relating to the partnership binds all the others. If one give a letter of credit or guarantee in the name of all the partners it binds all. But there is no general rule which may not be infected by covin, or such gross negligence as may amount to or be equivalent to covin; for covin is defined to be a contrivance between two to defraud or cheat a third. Therefore the whole will turn on this, whether the taking the guarantee from Fordyce himself, in his own handwriting, without consulting the other [487] partners, or having their privity, is not \*such gross negligence in the Hopes as will amount to a fraud or covin. Fordyce was acting in two several capacities, having transactions in his own name

only, for his own separate benefit, and in the names of the partnership for his own benefit. This case comes out of chancery, where an affidavit or answer of all parties might have been had if necessary; but none such has been produced, and therefore it must be taken that the partners knew nothing of it, and had no profit by it, or privity in the transaction. Another fact to be granted is, that as between Hope and Co., and Gurnal and Co., and Fordyce, the whole transactions are avowedly with Fordyce only in his separate capacity. The next fact is the correspondence in 1770, preceding the second guarantee. It is clear that Fordyce's deposits and interest in the funds were both doubted, and then the Hopes tried to make a scheme to get a second security without shocking him, by suggesting there was a new partner. The first guarantee was given in 1764, and that never had been called in, and still existed. There was then no occasion for a new one; for the change of a partner and taking in a new one would not destroy a former guarantee. The scheme was to get security for debts not well secured, the goodness of which was doubted; and they therefore get this from Fordyce alone, clandestinely, without the knowledge of his partners. If the fact be clear that Hope and Co. and Gurnal and Co. knew that this was done to cheat the partners of Fordyce, there is no question in the cause. But it is manifest that they trusted to it as binding on the partnership. Therefore this brings it to the second question, Whether it be not a gross negligence? especially as they knew at the time that Fordyce was acting in his separate capacity; and this security was intended to indemnify them against his separate debts.

Verdict for defendant.

Lord MANSFIELD afterwards, in his report to the court of chancery, on a motion being made for a new trial, said, three things were established to the satisfaction of himself and the jury. First, That the transactions between Hope and Co. and Fordyce were wholly on Fordyce's account; secondly, that the \*partners of Fordyce derived no profit or benefit whatsoever from them; thirdly, that they had no notice [\*488] of the guarantee, and consequently did not acquiesce in it. And Lord Mansfield said he left it to the jury, whether under these circumstances the taking of these guarantees were, in respect of the partners, a fair transaction or covinous, with sufficient notice to the plaintiffs of the injustice and breach of trust Fordyce was guilty of in giving them.

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## II.—SHIRREFF v. WILKS.

Nov. 18, 1818.—E. 1 East, 48.

THIS was an action upon the case upon a bill of exchange for £78, dated the 5th of November, 1796, payable to the order of the plaintiffs two months after date, which was stated in the declaration to have been drawn by them on the said G. Bishop, W. Robson, and J. Wilks, by the name and description of Messrs. George Bishop and Company, and to have been accepted by them. The defendant Wilks pleaded the general issue, on which issue was joined.

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The cause came on to be tried before Lord Kenyon at Guildhall, on the 5th of June last, when the jury found a verdict for the plaintiffs for £90, 10s., including interest on the bill; subject to the opinion of this court on the question, Whether the plaintiffs were entitled to recover under the circumstances of the case?

The plaintiffs in October, 1795, sold and delivered a quantity of porter to Bishop and Wilks, who were then partners, which porter was entered in the plaintiffs' books in the names of Wilks and Bishop, and the same was afterwards shipped for the West Indies, and the defendant Wilks paid the shipping charges. Robson became a partner with Bishop and Wilks in April, 1796, and continued so till the 8th of November following, when their partnership was dissolved. The defendant Wilks previous to the dissolution of the partnership sent to the plaintiffs a memorandum or calculation in his own handwriting of certain deductions claimed [\*489] by him in respect of the porter. \*The balance due to the plaintiffs in respect of the porter was £78, for which the plaintiffs drew upon the defendants the bill mentioned in the declaration, which bill was accepted by Bishop in the partnership firm of all the defendants, by his subscribing thereon "Accepted G. B. and Co."

*Lawes* for the plaintiffs.—As between the plaintiffs and Bishop and Wilks, the original partners by whom the debt was contracted, it must be admitted that Wilks is bound by Bishop's acceptance, though it were made without his concurrence, because one partner may bind another by accepting a bill on account of a partnership debt. It is true that one partner cannot pledge the security of another for his own private debt, nor if there be any fraud in the transaction as between him and the creditor to whom such security is given; but this was a debt incurred in the course of trade, and not of an individual or private nature. And no fraud is found here, nor can any inference of fraud arise from the facts stated. The creditors were guilty of no imposition in drawing the bill originally, nor could they control the manner in which it was to be accepted; but when accepted by any one of the house in their joint names, they must all be bound by it in the ordinary course of commercial dealings. If Wilks would have been bound, though he did not concur in the act of acceptance, and if the partnership fund were originally answerable to the plaintiffs, the introduction of a third partner cannot vary the case; it was only the continuance of the old partnership with the addition of a new member; and the bill was drawn on the fund which really and truly ought to pay it. The debt as between the defendants must be taken to have been transferred to the new partnership; but whether that were so or not is a matter to be settled between themselves, with which the plaintiffs have no concern. With regard to creditors the act of one partner must be taken to bind all the rest, otherwise all dealing with them must be attended with great perplexity. It may not be known to many at what time such a partner was taken into the firm.

*Gibbs*, contra, was stopped by the court.

[\*490] \*Lord KENYON, C. J.—I do not know how this case came to be reserved for the opinion of the court; for I have decided the

same question repeatedly at the sittings, and the propriety of my decision has never been canvassed again upon a motion for a new trial. This is an action brought against three persons, Wilks, Bishop, and Robson, as acceptors of a bill of exchange. It appears that the acceptance was in fact made by Bishop alone in the name of the firm. The consideration for this bill was some porter which had been sold by the plaintiffs to Wilks and Bishop only, at a time when Robson had no concern with the house. Then the plaintiffs, knowing this, draw the bill upon all the three partners, and knowingly take an acceptance from one of them to bind the other two, one of whom, Robson, had no concern with the matter, and was no debtor of theirs; no assent of his being found, and nothing stated to show that he had any knowledge of the transaction. It is hard enough for one partner in any case to be able to bind another without his knowledge or consent; but it would be carrying the liability of partners for each other's acts to a most unjust extent, if we suffered a new partner to be bound in this manner for an old debt incurred by other persons. The plaintiffs, therefore, ought not in justice to have taken this security by which they were to bind one who was not their debtor; the transaction is fraudulent upon the face of it. It is no answer to say that one partner has a general power of binding the rest. So an executor has power to bind the assets of his testator, and to sell and dispose of his effects; and the law reposes a confidence in him that he will apply the proceeds in payment of the testator's debts and legacies; but if fraud could be proved in any particular transaction between the executor and a purchaser such a sale would be void. In the case of *Worseley v. De Mattos*, 1 Burr. 474, Lord Mansfield, in delivering the opinion of the court, says, that "valid transactions as between the parties may be fraudulent by reason of covin, collusion, or confederacy, to injure a third person;" and he instances, if a man, knowing that a creditor has obtained a judgment against his debtor, buy the debtor's goods for a full price, to enable him to defeat the creditor's execution, it is fraudulent. Again, if a man knowing that an executor is wasting and turning the testator's estate into money, the more easily to run away with it, buy from the executor with that view, though for a full price, it is fraudulent. [\*491] The same doctrine was recognized by Lord Hardwicke, in *Mead v. Lord Orrery*, 3 Atk. 235; and again by Lord Mansfield, in *Whale v. Booth*, cited in the notes of the report of *Farr v. Newman*, 4 Term Rep. 625; and also in the case of *Elliot v. Merryman*, 3 Barnard, Ch. Rep. 81; vide *Crane v. Drake*, 2 Vern. 676, and in other cases. And nothing can be better established as a general rule than that the law will set aside every contract which is fraudulent. Such is the case here. Wilks and Bishop owed money to the plaintiffs; these latter, knowing that Robson had no concern with the matter, fraudulently receive from Wilks and Bishop a security by which Robson is to be bound; this, therefore, cannot be enforced in this action.

GROSE, J.—This is a mere fraudulent attempt to make Robson pay the debt of Bishop and Wilks; and the plaintiffs shall not be permitted to avail themselves of a security so obtained in order to bind a man without his assent for the payment of a debt who owed them nothing. And

the security being void against Robson, the plaintiffs cannot recover in this action against the three, wherein if he obtained judgment he might sue out execution against any of the defendants.

LAWRENCE, J.—The plaintiffs in this action declare as upon a promise by three defendants; and consequently to entitle themselves to recover they must prove a promise either express or implied binding upon all the three; in this they have failed, and therefore there must be judgment against them. In addition to the authorities cited by my lord to show that Robson was not bound by this act of his partners, is the case of *Hope v. Cust*.

LE BLANC, J.—This case must be determined in the same manner as if Robson had pleaded to the action. It seems admitted that if one of several partners pledge the partnership fund for his individual debt, that will not bind the rest. Now, I see no difference between the case of one [492] and the case of two \*of several partners pledging the joint fund for their individual debts; which is the case before us.

Postea to the defendant.

### III.—RIDLEY v. TAYLOR.

Nov. 28, 1810.—E. 13 East, 175.

THE plaintiffs declared in the first count of the declaration upon a bill of exchange, dated the 20th of October, 1807, drawn by certain persons using the style and firm of Ord and Ewbank upon the defendant, for £40, payable to the order of Ord and Ewbank forty days after date; which bill was stated to have been indorsed by Ord and Ewbank, and duly accepted by the defendant. There were also counts for goods sold and delivered, and the common money counts. The defendant pleaded non-assumpsit; and at the trial before Wood, B., at Durham in 1809, a verdict was found for the plaintiffs for the amount of the bill, subject to the opinion of the court on the following case:—

The plaintiffs in November, 1806, sold and delivered to J. Ewbank, (who, together with Ord then, and subsequent to the transactions hereafter mentioned, carried on trade as linen-draper, under the firm of Ord and Ewbank,) on his separate account, a cargo of coals to the amount of £34, 11s. On the 9th of May following the plaintiffs received from Ewbank £5 on account, and on the 27th of the same month his promissory note for £29, 9s. 5d., which, after allowing 1s. 6d. for the stamp, constituted the balance. This note being dishonoured, the plaintiffs were obliged to, and did take it up, on the 2d of November, 1807. On the 7th of the same month Ewbank gave to the plaintiffs the bill in question, in payment and discharge of his (Ewbank's) said debt. This bill was drawn and indorsed by Ewbank in the style and firm of Ord and Ewbank, [493] and was before \*that time accepted by the defendant. "Ord and Ewbank" is the usual firm of that partnership. A few days after Ewbank had delivered this acceptance to the plaintiffs, he applied to



them for the balance of £9, 19s. 9d. ; but the plaintiffs refused to pay it until the bill upon the defendant should have been paid. The plaintiffs negotiated the bill for £40, and were, in consequence of its being dishonoured, although duly presented for payment to the defendant, ultimately obliged to pay and have actually paid the amount thereof and the charges of noting the same ; and they thereupon debited Ewbank alone for the same in their account with him ; having before credited his said account with them for the amount of that bill. Ord and Ewbank have since become bankrupts. The question was, Whether the plaintiffs were entitled to recover ? If they were, the verdict was to stand ; if not, a nonsuit was to be entered.

*Hullock*, for the plaintiffs, stated the question to be, Whether one partner could draw or indorse a bill in the partnership firm for his own debt, in favour of a third person, to whom no fraud or knowledge of the drawer's want of authority from his partner was imputed ; and whether this could be questioned by the acceptor of the bill in an action brought against him be the payees ? He relied on *Swan and Others v. Steele and Others*, 7 East, 210, as in point ; where an indorsement of a bill by two partners, in the partnership firm, for their separate debt, was held to bind a third partner who was engaged with them under the same general firm in another business, in the course of which such bill was received by them, the indorsees and separate creditors of the two not knowing of the misapplication of the tri-partnership fund at the time. The only difference (merely nominal) between the cases is, that there the separate creditors did not know at the time of the existence of a third partner, whose name did not appear in the firm ; and here they did not know that the other partner did not consent to this application of the partnership credit. There might be good reason for such consent, as to save the credit of one of the house. If one of several country bankers paid his own debt in the notes of the house, as would probably be the case in most instances, where the notes of such a house \*were in circulation, it would be extremely inconvenient if the creditor [\*494] were obliged to go round to all the partners to know whether they assented to it. In the present instance it does not appear, that in the settlement of the partnership accounts, and the distribution of the profits between them, this bill did not become the particular property of Ewbank. The court will never presume collusion or fraud, where none is found, unless in cases where the law presumes fraud.

*Holroyd*, contra.—The law does not imply an authority in individual partners over the joint fund, except in matters which affect the partnership concerns. Thus far only the law gives effect to such a general authority, that where one partner has for his own purpose disposed of the effects or passed negotiable securities on the credit of the partnership, which have gone out into the world, it shall bind all the partners in the hands of innocent third persons having no knowledge of the real transaction, because they would have a right to presume that he acted with the authority of his partners ; but that will not extend to protect the original takers of such property, knowing that it was issued for his separate debt. Now, here the action is not brought by third persons to

whom the bill was indorsed without notice, but by the separate creditors of Ewbank themselves, who must have known that he was pledging the partnership funds for his own debt, and who were therefore bound to inform themselves that he had a special authority so to do. In the case of one of several partners in a country bank paying his own debt with the notes of the bank, which were in common circulation, the creditor receiving such notes could not tell whether they might not have been before circulated, and have come back into the partner's hand, as his individual property; and then, perhaps, it would be necessary to fix the creditor with knowledge to the contrary; or at any rate, if he passed them off to others, who had no notice, they would be entitled to recover against all the partners, and so no public inconvenience could ensue. But where a creditor of one partner takes a particular security for his separate debt upon the partnership fund, he must know that his debtor is paying his debt with the money of others, and therefore he takes it at [\*495] his peril, if it should turn out in the event that the debtor had no authority to bind his partner for that purpose. It is the same between those parties as if the debtor had pledged the fund of a stranger for his own debt, on his own assertion that he had authority to do so; if he had such authority the pledge would be good; but the creditor would take it at the peril of proving that authority if it were afterwards denied. Here the bill was accepted by the defendant before it was indorsed; and the indorsement, though in the name of Ord and Ewbank, was made by Ewbank alone, and therefore the plaintiffs must stand upon his single authority. The defendant, when he accepted the bill, must have presumed that it was drawn on the joint account; but now, having notice that Ewbank had no authority from Ord to indorse it, the latter may well defend himself, through the defendant, against the plaintiffs, who knew that it had been passed by Ewbank on his private account; for if the plaintiffs recover against the defendant, he will be entitled to recover over against Ord and Ewbank; and therefore the question is the same as if they had sued Ord and Ewbank in the first instance. In *Arden v. Sharpe and Gilson*, 2 Esp. N. P. Cas. 524, where the plaintiff discounted a bill brought to him by Gilson, who desired that the business might be kept secret from his partner Sharpe, but indorsed it in the name of Sharpe and Gilson, Lord Kenyon held, that the action on the bill would not lie; for the transaction indicated that the money was for Gilson's own use, and not on the partnership account; and therefore that the plaintiff should not be allowed to resort to the security of the partnership. The same principle was established in *Wells v. Masterman and Others*, 2 Esp. N. P. Cas. 730, where Lord Kenyon said, that if a man have dealings with one partner only, and he draw a bill on the partnership on account of those dealings, he is guilty of a fraud, and in his hands the acceptance made by that partner will be void; but it would be otherwise in the case of a *bona fide* indorsee. *Abel v. Sutton*, 3 Esp. N. P. Cas. 108, recognised the same principle, which was again confirmed by the whole Court in *Shirreff and Another v. Wilks and Others*, 1 East, 48. There two of three partners having contracted a debt to the plaintiffs before the admission of the third partner into the

firm, afterwards accepted \*in the firm of the three, but without the assent of the new partner, a bill drawn upon the new firm by [\*496] the plaintiffs; and the security was held fraudulent and void as against the third partner. Lord Kenyon there relied on the assent of the third partner not having been found, and there being nothing stated to show that he had any knowledge of the transaction. And Lawrence, J., observed, that the plaintiffs declared as upon a promise by three defendants; and consequently, to entitle themselves to recover must prove a promise either express or implied, binding upon all the three, in which they had failed, and therefore there must be judgment against them. The case of Mr. Fordyce was also there referred to as of the same description, which was decided on the ground of covin or gross negligence on the part of the separate creditor taking the joint security. [Lord ELLENBOROUGH, C. J.—One partner pledging the guarantee of the firm for his separate debts, is a very different case from that of drawing or indorsing bills in the partnership firm: the one authority is not necessary or usual for carrying on the concerns of the house, the other is. The only question here is, Whether the plaintiffs had such notice that the bill was indorsed by the one partner without the authority of the other, as to take the case out of the general rule. LE BLANC, J.—It does not appear that the plaintiffs knew that Ewbank was the partner who in fact indorsed the bill.] It would be the same if done by a clerk in the house: the plaintiffs taking a joint security, knowing that it was for a separate debt, must take it at the peril of proving the authority of the one to pledge the other's credit for his personal debt. As to Swan v. Steele, the indorsement was made in the firm common to both the houses of trade; and the creditor did not know, at the time he received the bill, that the indorsement would bind any other than the persons who were his debtors; and that distinguishes it from the present case.

*Hullock*, in reply, contended that the *onus probandi* lay upon the defendant in this case to show that Ewbank had not the authority of Ord to pledge his credit by the indorsement in the partnership firm; it being within the scope of a trading partner's general authority to draw, accept, and indorse bills of \*exchange in the partnership firm, without [\*497] the necessity of the creditor's inquiring whether the particular partner had such authority. The cases cited on the other side must have gone on the ground that the want of authority was indicated by the circumstances of the case; for they recognise the general principle, that one partner may bind another by such securities given in their joint names.

Lord ELLENBOROUGH, C. J.—*Prima facie* one partner is bound by the indorsement of another in the partnership firm; but that presumption may be cut down by showing collusion; but the difficulty of the case is that we have not the facts sufficiently before us to show that collusion.

*Holroyd* observed, that the defendant could not have called Ord as a witness to negative the authority of Ewbank to indorse the bill for his own debt; because, if the plaintiffs recovered against Taylor, he would have his remedy over against Ord. But BAYLEY, J., said that Ord would in that case have his remedy over against Ewbank, and therefore

would stand indifferent. *Hobroyd* suggested a doubt on the ground of Ewbank's bankruptcy; but Lord ELLENBOROUGH, C. J., observed, that the bankruptcy could make no difference on that question.

*Cur. ad. vult.*

Lord ELLENBOROUGH, C. J., now delivered the judgment of the court:—

This was an action by Ridley and Knaggs, the plaintiffs, upon a bill of exchange, drawn by Ord and Ewbank on the defendant, payable to their own order, and by them indorsed to the plaintiffs, and accepted by the defendant. [Then, after stating the case, his lordship proceeded.] If this were distinctly the case of a pledging by one partner of a partnership security for his own separate debt without the authority of the other partner; or if there existed in this case evident covin between one partner and the holder of the partnership security, upon which the action is brought, in order to charge the other partner without his knowledge or consent, either express or implied, for \*the private advantage of the parties to such covinous agreement; we should have no hesitation to pronounce a bill, drawn and indorsed under such circumstances, void in the hands of the covinous holders, upon the principle laid down in the case of *Shirreff and Another v. Wilks and Others*, 1 East, 48. But upon the facts stated, such does not distinctly appear to us to be the case. Nor does it appear that there was any such *crassa negligentia* on the part of the plaintiffs, in not inquiring whether Ewbank, the one partner with whom they dealt, was authorized to dispose of this security (which had originally been partnership property) as his own, as to render this transaction on that account fraudulent, and therefore void. In the case of *Shirreff and Another v. Wilks and Others*, the plaintiffs drew for a balance due from Bishop and Wilks for porter sold to them, exclusively of their third partner Robson; and then they sought to charge Robson, as well as Bishop and Wilks, by the acceptance of Bishop in the partnership firm of G. Bishop and Co. In that case, if the plaintiffs meant their bill, which was drawn generally on G. Bishop and Co., as a bill upon the three partners, (and Lord Kenyon clearly so considered it,) they must have been conscious that it was an unauthorized act in them to draw on the partnership firm and funds of the three for the separate debt of two; and they must have been fully aware that the third partner, Robson, was at the time ignorant that they had so done. And if they did not mean to draw upon the three, but upon Bishop and Wilks only, what right could they have to apply a general acceptance in the name of Geo. Bishop and Co., to charge Robson, where there was no reason to suppose that Robson had consented that his security should be pledged? That case, therefore, presented circumstances from which, in the attempt to charge Robson, covin to the prejudice of the third partner might fairly be inferred. In that case, too, Robson, Wilks, and Bishop, (the only persons likely to know whether Robson's security was intended to be pledged, and whether he had consented that it should be pledged,) were made parties to the suit; so that none of them could in that suit be called as witnesses. The case, therefore, hardly admitted of positive evidence as to these points, and the court could have nothing whereupon

to act but presumption. In the present case so \*strong an inference of covin does not arise; Ord and Ewbank would have [\*499] been competent witnesses for the defendant in the case; positive evidence, therefore, upon the point of covin, if there really were any, might have been adduced. This bill had an existence, according to its apparent date, 18 days before the time of its delivery to the plaintiffs; it was drawn for a sum considerably exceeding the debt; and was not only drawn and indorsed, but accepted also, before it was produced to them; and although it is stated in the case that in fact the bill was drawn and indorsed by Ewbank in the partnership firm, it does not appear that the plaintiffs knew that it was drawn and indorsed by him. Under these circumstances, it might reasonably be supposed, by the party to whom it was given, to be a partnership security, of which Ewbank, the partner in possession of it, had, for some valuable consideration, or in virtue of some arrangement with Ord the other partner, become the proprietor, so as to be authorized to deal with it as his own. At any rate the contrary does not either actually or presumptively appear. And it seems to us, in order to deprive the plaintiffs of the benefit of such a security in a case which admits of positive proof to the contrary, that the contrary should appear; and that either actual covin should be shown, or that at least more pregnant evidence to induce that conclusion should have been given on the part of the defendant than is disclosed upon the face of this case. All that appears here is, that a partnership security was applied by the one partner, Ewbank, in satisfaction of his separate debt, without showing that such application was at the time unknown to or unauthorized by the other partner Ord; as, by the evidence of either Ewbank or Ord, it was in this case competent to the defendant in point of law to have done; and without laying before the court any other evidence, from which the same conclusion ought to be drawn. In the absence, therefore, of any evidence to show that the delivery of this bill to the plaintiffs was covinous, in a case where positive evidence of the covin might have been given, had covin really existed, the court feels itself obliged to give effect to the transfer of the bill, and to say that the defendant, who relied upon covin as his defence, has not satisfactorily established such covin. It is therefore our duty to direct, that the verdict \*which has been given for the plaintiffs in this case should stand, to the extent of the debt due from Ewbank to the plain- [\*500] tiffs; but it ought to be reduced to that sum, vide *Pinkney v. Hall*, Salk. 126, and *Carvick v. Vickery*, B. R. H. 23 Geo. III., Dougl. 653.

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#### IV.—MILLER v. DOUGLAS.

Jan. 22, 1811.—S. F. C. 154.

JOHN BLAIR MILLER, merchant in Dundee, lent to William Sturrock and James Small £500, on their accepted bill, dated 2d September, 1801, payable one day after date.

On the 15th June, Sturrock became bankrupt, and John Blair Miller ranked upon his estate, and drew certain dividends, reducing the debt to £367, 7*d.*

James Small and William Douglas, of Brydgeton, were (among others) partners of a company under the firm of James Ivory and Company. In the articles of copartnership it was stipulated, 1st, That the firm of the society should be used by James Ivory alone; and 2dly, That this James Ivory should not be empowered to bind the society to any amount beyond £100, without special authority from the majority of partners.

James Small granted the following acceptance to John Blair Miller in the name of Ivory and Company:—

*“Dundee, 16th March, 1803.*

*“£367, 0*s.* 7*d.* sterling.*

*“Six months after date, please pay to me, or order, at my shop here, Three hundred and sixty-seven pounds sevenpence, value received of*

*(Signed)*

*“J. B. MILLER.*

*“To Messrs. James Ivory & Co., Douglstown.*

*(Signed)*

*“JAMES IVORY & Co.”*

A writing, holograph of John Blair Miller was recovered, giving an account of the transaction in the following terms:—“J. B. Miller lent Messrs. Sturrock and James Small, on their conjunct acceptance, dated [501] 2d September, 1801, at 1 d. d. £500, \*on which he received a dividend from the trustee on Mr. Sturrock's estate, 16th June, 1803; and Mr. Small had promised that against that time he would pay the whole. He then said this was put out of his power by the want of command of a considerable sum he had advanced for the concern of the petitioners, James Ivory and Company, (of which he was the managing partner;) but that for the further security of J. B. Miller, he would grant him the acceptance of Ivory and Company, to be due in three months, for the balance of the principal sum owing him on the above mentioned conjunct acceptance, and interest, amounting in all to £367, 7*d.*, for which J. B. Miller claims to be ranked as Messrs. James Ivory and Company's creditors, less a dividend of £29, 1*l.* 3*d.* from William Sturrock's estate, 16th December, 1803.”

Ivory and Company became bankrupt; and the drawer charged William Douglas, who was the only solvent partner, for payment of the bill.

William Douglas pursued a suspension of the charge; and the interlocutor of the lord ordinary thereon (16th June, 1810,) was—“Finds that the bill charged on, accepted under the firm of ‘James Ivory and Company,’ is admitted to have been accepted by James Small, not for a debt of James Ivory and Company, but in satisfaction of a balance due to the charger by himself individually, on a joint acceptance by him and William Sturrock, after deduction of the sum which had been drawn upon it from the sequestrated estate of the other co-obligant William Sturrock; while, from the terms of the contract of copartnery, which gave the sole power of adhibiting the company's firm to bills and other obligations to James Ivory personally, and expressly declared that no other partner shall be entitled to adhibit the same, he could not, unless

authorized by a special sederunt of the company, while no such authority is produced or referred to, as investing him with such a power, admit the firm to the bill in question, suspends the letters *simpliciter*, and decerns."

The charger then offered to prove that James Small had been in the practice of accepting bills under the company's firm; that the terms of the copartnery had not been observed by the partners, either with respect to the restriction of the \*partners who should use the firm, [\*502] or with respect to the amount for which it should be used, without the permission of the majority; and that bills thus accepted had been uniformly paid by the company.

The lord ordinary, 6th July, 1810, refused this offer of proof, and adhered to the former interlocutor, "being satisfied, that if the usage of the company's bills going into the circle accepted by James Small under the company firm was to be established, and could be held, with respect to persons *bona fide* advancing money, or furnishing goods, in reliance on such acceptances, to remove the obligation arising from that condition of the contract of copartnery, which confines the power of admitting the company firm to James Ivory, that there remain in the other circumstances of this case, sufficient grounds for the judgment pronounced."

*The Charger reclaimed and pleaded.*—The obligations or restrictions in the contract of copartnery, for the purpose of regulating the powers and interests of the partners among themselves, cannot affect the public in their transactions with the society; and any one who signs a bill or other obligation by the company's firm obliges all the other partners.—*Erskine*, b. iii. tit. 3, § 20; 14th June, 1766, *Dewar v. Miller*; *East's Reports*, vol. vii. p. 210, *Shaw v. Steele*; *Bell's Bankrupt Law*, p. 565, 2d edit. From the nature of the transaction there is no room for any objection of *mala fides*. That the particular terms of the copartnery were known to the charger is not proved, nor indeed are such private stipulations of any importance. The charger took this acceptance on the supposition that the acceptor, being in advance for the company, and a partner of it, was entitled to grant it. The distinction is well settled, that if a creditor of one of the partners collude with him to take payment or security for his individual debt, out of the partnership funds, knowing at the time that it is without the consent of the other partners, it is fraudulent and void; but if taken *bona fide*, without such knowledge at the time, no subsequently acquired knowledge of this misconduct of the partner in giving such security can disaffirm the act. No such \*collusion is established in the present case; and [\*503] if the charger had been aware at the time that James Small had no authority to use the firm, he might have obtained some other security for his debt.

*The Suspender pleaded.*—The general principle of law is not disputed, that a partner, notwithstanding any restrictions in the contract of copartnery, may effectually bind all the partners in transactions in the usual course of trade. The liability of all the partners for acceptances which, although granted by a restricted partner, yet may be

reasonably supposed to occur in the ordinary dealings of the company, is admitted. But, in the present instance, the transaction was, from its very nature, out of the ordinary course of dealing; the acceptance was for an individual debt of the partner; and all this was known to the charger. Independent of any stipulations and restrictions in the contract, a partner is not entitled to grant the acceptance of the company for his individual debt; and no one is entitled *bona fide* to take it. Whatever may be the case with subsequent indorsees, there never can be any ignorance in the case of the creditor of the individual partner drawing the bill for his debt, to which the acceptance under the company firm is adhibited. The charger was bound to inquire, whether James Small was in advance for the company; and if due inquiry had been made, he would have learned that James Small was not entitled to use the company firm at all. These principles are confirmed by many authorities.—1 East, p. 53, *Hope v. Cust*; 1 East, p. 48, *Shirreff v. Wilks*; *Erskine*, b. iii. tit. 3, § 20.

Lord CRAIG observed.—That no doubt the social contract in the present case imposed certain restrictions and limitations on the use of the firm; and any violation of these, by any of the partners, was a fraud against the other partners to the contract; but such restrictions were not effectual against third parties contracting *bona fide* with the partners in the usual and reasonable course of trade. In the circumstances of this case, however, the charger was not in a situation to plead upon these [\*504] general principles. But the interlocutor, although well founded \*in the circumstances of this case, was not in its terms sufficiently qualified to save the law; and, in so far as it might import any infringement of these great and general principles, it ought to this extent to be altered.

Lord HERMAND observed.—That where a party transacted with the partner of a company *privito nomine* avowedly, and took a company bill for a debt due by such partner individually, this was a transaction which, in a question with the creditor, could not bind the company. The point had been many times decided; and the holograph writing of the charger proved his perfect knowledge of the nature of the transaction.

Lord ARMADALE observed.—It is a principle well established, both here and in England, that limitations upon the use of the firm, in a contract of copartnery, are of no force against third parties in *bona fide* transactions. But a partner is not entitled to grant, and a creditor is not safe to receive, a bill accepted under the company firm for a private debt due by the individual partner. In the present case there was clear evidence that the nature of the transaction was well known to the party who received the bill, and who charged for payment of it.

The LORD PRESIDENT observed.—That the clauses in the contract of copartnery, restricting the use of the firm to one of the partners, and limiting the extent to which it might be used by him, to £100, were of no effect against third parties, who are not bound to know, and have no opportunity of knowing, these private regulations among the partners. This general principle of law was quite clear, and could not be disputed. The bill, in the present case, had been accepted under the company



firm; and the security of the company had been thus pledged for a debt due by an individual partner, and for a debt which was long past due, and in which one of the original debtors had become bankrupt. The company was in fact substituted in place of one of the original and bankrupt obligants. By the partner himself this was a gross fraud. The nature of the debt, for the security of which the company's name was pledged, and the circumstances attending it, were all known to the \*charger, and were in themselves of a very suspicious nature. [\*505]

He was told no doubt that James Small was in advance for the company; but of this there was no evidence, except the assertion of Small, which was not sufficient. It was the duty of the charger to have consulted the acting partners; and without notice to them he was not in safety to take the bill. In these circumstances, the charger did not come within the general principles of law.

The interlocutor of the court (22d January 1811,) was,—“Refuse the desire of the petition, and adhere to the lord ordinary's interlocutor dated the 6th of July last.”

1. The case of *Arden v. Sharpe and Gibson*, 2 Esp. 524, was an action of assumpsit by the plaintiff as indorsee of a bill of exchange, which he had discounted at the request of Gibson one of the defendants, and who informed the plaintiff that he wished the business to be kept a secret from his partner the other defendant. Lord KENYON observed,—“The bill is indorsed by one partner in the name of the firm. One partner certainly may indorse a bill in the partnership name; and if it goes into the world, and gets into the hand of a *bona fide* holder, who takes it on the credit of the partnership name, and is ignorant of the circumstances, though in fact the bill was first discounted for that one partner's own use, in such case the partnership is liable. But the case is different where the party who brings the action was himself the person who took the bill with the indorsement by one partner only, and was informed that the transaction was to be concealed from the other. He cannot sue the partnership. The transaction indicates that the money was for that partner's own use, and not raised on the partnership account, therefore he shall not be allowed to resort to the security of the partnership, to whom in the original transaction he neither looked nor trusted.”

2. “In all contracts concerning negotiable paper, the act of one partner binds all; and even though he signs his individual name, provided it appears on the face of the paper to be on partnership account, and to be intended to have a joint operation. But if a bill or note be drawn by one partner, \*in his own name only, and without appearing to be on partnership account, [\*506] or if one partner borrow money on his own security, the partnership is not bound by the signature, even though it was made for a partnership purpose, or the money applied to a partnership use. The borrowing partner is the creditor of the firm, and not the original lender. If, however, the bill be drawn by one partner in his own name, upon the firm, on partnership account, the act of drawing has been held to amount, in judgment of law, to an acceptance of the bill by the drawer in behalf of the firm, and to bind the firm as an accepted bill. And though the partnership be not bound at law in such a case, it is held, that equity will enforce payment from it, if the bill was actually drawn on partnership account. Even if the paper was made in a case, which was not in its nature a partnership transaction, yet it will bind the firm, if it was done in the name of the firm, and there be evidence that it was done under its express or implied sanction. But if a partnership security be taken from one partner, without the previous knowledge and consent of the others, for a debt which the creditor knew at the time was the private debt of the particular partner, it would be a fraudu-

lent transaction, and clearly void in respect to the partnership. So, if from the subject-matter of the contract, or the course of dealing of the partnership, the creditor was chargeable with constructive knowledge of that fact, the partnership is not liable. There is no distinction in principle upon this point between general and special partnerships; and the question in all cases is a question of notice, express or constructive. All partnerships are more or less limited. There is none that embraces at the same time every branch of business; and when a person deals with one of the partners in a matter not within the scope of the partnership, the intendment of law will be, unless there be circumstances or proof in the case, to destroy the presumption that he deals with him on his private account, notwithstanding the partnership name he assumed. The conclusion is otherwise, if the subject-matter of the contract was consistent with the partnership business; and the defendants in that case would be bound to show that the contract was out of the regular course of the partnership dealings. When the business of a partnership is defined, known, or declared, and the company do not appear to the world in any other light than the one exhibited, one of the partners cannot make a valid partnership engagement, except on partnership account. There must be at least some evidence of previous authority beyond the mere circumstance of partnership, to make such a contract binding. If the public have the usual means of knowledge given them, and no acts have been done or suffered by the partnership to mislead them, every man is presumed to know the extent of the partnership with whose members he deals. \*And [507] when a person takes a partnership engagement, without the consent or authority of the firm, for a matter that has no reference to the business of the firm, and is not within the scope of its authority, or its regular course of dealing, he is, in judgment of law, guilty of a fraud. It is a well established doctrine, that one partner cannot rightfully apply the partnership funds to discharge his own pre-existing debts, without the express or implied assent of the other partners. This is the case even if the creditor had no knowledge at the time of the fact of the fund being partnership property. The authority of each partner to dispose of the partnership funds strictly and rightfully extends only to the partnership business, though in the case of *bona fide* purchasers, without notice, for a valuable consideration, the partnership may, in certain cases, be bound by the act of one partner."—3 Kent, Com. Lect. 43, pp. 41-43.

In *Galway v. Mathew*, 10 East, 264, it was held that the authority of one partner to bind another by signing bills of exchange and promissory notes in their joint names is only an implied authority, and may be rebutted by express previous notice to the party taking such security from one of them that the other would not be liable for it. This rule was held to apply, even although it were represented to the holder by the partner signing the security, that the money advanced on it was raised for the purpose of being applied to the purpose of partnership debts, and although the greater part of it were so applied. Lord ELLENBOROUGH observed,—“The general authority of one partner to draw bills or promissory notes to charge another is only an implied authority; and that implication was rebutted in this instance by the notice given by Smithson, who is now sought to be charged, which reached the plaintiff, warning him that Mathew had no such authority. It is not essential to a partnership, that one partner should have power to draw bills and notes in the partnership firm to charge the others; they may stipulate between themselves that it shall not be done; and if a third person having notice of this will take such a security from one of the partners, he shall not sue the others upon it, in breach of such stipulation, nor in defiance of a notice previously given to him by one of them, that he will not be liable for any bill or note signed by the others.”

\*WHERE THE NAME OF A FIRM IS THE NAME OF ONE OF THE PARTNERS, AND THE BUSINESS IS CARRIED ON IN HIS NAME ONLY, A PARTY FOUNDING UPON A BILL GRANTED BY THAT PARTNER, MUST SHOW THAT IT WAS GRANTED BY THE PARTNER AS REPRESENTING THE FIRM, AND NOT BY HIMSELF AS AN INDIVIDUAL. [\*508]

### SOUTH CAROLINA BANK v. CASE.

June 25, 1828.—E. 8 B. & C. 427. Eng. Com. Law. Reps., vol. 15.

THIS was an issue, directed by the vice-chancellor, to try whether Thomas Crowder and Henry Thomas Perfect, the bankrupts, and James Butler Clough, were, on the 13th day of August, 1825, (the date of the commission of bankrupt against Crowder and Perfect,) indebted to the said plaintiffs in any, and what sum of money. The issue stated a promise by the defendants to pay the plaintiffs one shilling for every pound of the debt which might be due to the plaintiffs. And the plaintiffs averred £15,000 to be due.

The cause came on to be tried before Hullock, B., at the assizes for the county of Lancaster, when a verdict was found for the plaintiffs, subject to the opinion of this court on the following case:—On the 3d of November, 1815, J. B. Clough entered into articles of co-partnership with Thomas Crowder and Henry Thomas Perfect, the bankrupts, whereby they agreed to carry on the trade or business of a consignee or factor for persons trading from the United States of America to England, and such other branches of business as they should mutually agree upon in co-partnership for the term of four years, from the 1st of January then next; and by a clause in the articles it was declared, that the firm of the partnership should be “Crowder, Clough, and Co.” It was also stipulated by the articles that Perfect should forthwith proceed to the United States of America to advance the business of the concern as consignees or factors, and in such other manner as might best answer the purposes of the partnership. That no one of the parties should carry on or be concerned in the business before \*mentioned on their own separate account, nor carry on any trade in partnership with any other person or persons whomsoever during the said term, nor should they carry on any trade or business on their own account, distinct from the said partnership, nor carry on any in the name or firm of the said partnership, nor on account thereof, without the consent in writing of each of the parties. That proper books of account should be kept in England and in America, while Perfect was resident there, in which respectively should be fairly entered and kept the accounts, dealings, and concerns relative to the aforesaid partnership transactions. He went accordingly, and transacted business in America for the partnership, but it was all done in his name. Perfect returned in 1819, and by an agreement, bearing date the 9th day of October, 1819, the partnership was extended two years upon the former terms, except in some particulars not affecting the present question; and the parties agreed [\*509]

that they would continue to carry on the said trade or business for that time, and such other branches of business as they should from time to time mutually agree upon. And it was agreed that Perfect should have a yearly allowance of £600 for such time as he should stay in America on the partnership account; and he again proceeded to the United States, where he continued two years, transacting the partnership business in his own name. On his return in 1821, it was agreed that the term of the co-partnership should be again extended two years, and that the parties should continue to carry on the said trade or business, and such other branches of business as they should from time to time mutually agree upon for that term; and that Clough should succeed Perfect; and a supplementary agreement was entered into, bearing date the 27th of October, 1821, upon the like terms as the former articles, except as thereby altered in some matters not affecting the present question. And it was agreed that Clough should proceed to the United States, and use his best endeavours for the general benefit of the concern, and should have a yearly allowance of £500 for such time as he should remain in America on the partnership account. Previous to Clough's departure, written instructions were given him for his conduct in the United States.

[\*510] They bear date the 29th day of October, 1821, \*and were signed by Crowder and Perfect, and they were approved of as a guide for the future conducting of business. In the instructions are the following paragraphs:—"No shipments to be made solely on our account, but the above price to regulate shipments in conjunction with other parties, when they require us to participate in the risk to induce them to make a consignment. It is to be hoped, however, that there will be no necessity to extend this sort of business, and that it will be as much avoided as possible. Our main object is consignments, either of ships or produce, and with a view to secure such, should we be induced to risk a share of shipments, (if such can be had without, we should prefer it,) we should not wish a larger sum than £5000 to be risked, even in the smallest degree, at any one time, in such participations; and the result of these shipments ought to be known, or safely calculated on, by advices from home, before any new arrangements are formed. It is understood that our names are not to appear on either bills or notes for the accommodation of others; and that they should appear as little as possible on paper at all, and then only as regards direct transactions with the house here." The business of Crowder, Perfect, and Clough was that of factors or commission-merchants for principals trading between Great Britain and the United States. Their business in this country consisted principally in the sale and purchase of goods, and the collection of freights for principals in the United States, on commission. Their business in the United States consisted in the sale and purchase of goods, and in the collection of freights for their principals in England, on commission, and occasionally in the purchases of cotton, jointly with others, to secure a consignment; and sometimes Clough purchased cotton on speculation, notwithstanding the clause in the instructions above set forth, viz., "That no shipments were to be made solely on their account;" and in the course of this business Clough occasionally

sold and purchased bills of exchange. In England the business of the house was carried on in the name of Crowder, Clough, and Co.; in the United States all the partnership business was transacted in the name of J. B. Clough alone. The bankrupts in England, and Clough in the United States, procured consignments for their joint benefit on commission; \*the bankrupts as to consignments to the United States for sale [511] by Clough, and Clough as to consignments to England for sale [511] by the bankrupts; Clough using his own name only in these, as well as all other transactions in the United States. In order to obtain consignments from the United States, the bankrupts and Clough made advances, or granted drafts or bills of exchange, or indorsements thereof, to their principals in the United States, upon the security of such principals' goods consigned to the bankrupts and Clough for sale in Great Britain; and the business relating thereto was conducted as follows:—first, in some cases bills of exchange were drawn in the name of J. B. Clough upon Crowder, Clough, and Co., in favour of their principals, and were delivered to such principals; secondly, in many other cases, bills of exchange were drawn by the principals upon Crowder, Clough, and Co., and indorsed in the name of J. B. Clough, and delivered to the principals with such indorsements; thirdly, in other cases, bills of exchange were drawn by J. B. Clough, in his own name, on Crowder, Clough, and Co., and indorsed by him, and sold, and the proceeds advanced to the consigners; fourthly, in other cases, J. B. Clough used to raise money for advances to consigners by drawing upon American houses in New York, or by the consigners drawing on them, and J. B. Clough provided for these bills by sending to the American houses bills on England to be discounted there; bills on England not being always negotiable at Charleston. Consignments of cotton were procured by J. B. Clough, by means of these transactions, to the English house for sale, on account of the consigners, to a very great amount. Clough also bought and sold bills of exchange in his own name on speculation, the profit and loss whereof was carried to the partnership account. Clough also sold and purchased goods in America in his own name, for English principals, to a large amount. The profits made by the partnership in America, in commission and exchange speculations, in the name of J. B. Clough, were very considerable, amounting in 1822 to £1377, in 1823 to £2700, in 1824 to £5000, but in 1825 there was a loss. Proper partnership books were kept; the bankrupts entering in their books all the dealings and transactions in this country, and Clough entering in the books kept by him in \*America all the dealings and transactions in the [512] United States. At the end of each year the annual balance of [512] profit and loss in England and the United States was divided between the partners. Clough, during the whole time that he was in the United States, viz., from 1821 to the bankruptcy, never traded or drew, indorsed, accepted, or negotiated any bills of exchange, or carried on any business on his own account. But he entered into a joint speculation, intending it to be on the partnership account, with two persons, Joshua T. Weyman and Michael Lazarus, in his own name, to the extent of £100,000 and upwards, notwithstanding the clause in the instructions above set

forth; viz., "We should not wish a larger sum than £5000 to be risked, even in the smallest degree, at any one time in such participations." This transaction was afterwards adopted by the bankrupts. He had no individual business whatever, and the name of J. B. Clough was never used by him in trade, or in drawing, indorsing, or accepting, or negotiating bills of exchange, except for the benefit and on account of the partnership; and all the partnership business in the United States was carried on in that name and no other, save when the consigners of goods drew bills of exchange on England on account of their consignments; in which cases they always drew on Crowder, Clough, and Co. Clough was restricted by the partnership articles from transacting any business there in any manner whatever, except on the partnership account. Clough, who was the only witness examined on either side at the trial, swore that there was no specific agreement between him and his partners that there should be a house under the name of J. B. Clough in America; that he was sent out to form a branch of the house in America; that he had instructions not to use their name; that he had no doubt that they intended he should form a branch of the house, and that the branch was carried on in America in the name of J. B. Clough, with the sanction of all the three partners, although there was no specific agreement that it should be so carried on. Clough obtained from J. T. Weyman of Charleston, consignments of a large quantity of cotton to the house of Crowder, Clough, and Co., for sale on J. T. Weyman's account, and it was agreed between Weyman and Clough, that J. T. Weyman should [\*513] draw bills upon Coffin and \*Weyman of New York, merchants, payable to Clough, and that Clough should indorse them; it being understood between them that the Carolina Bank would discount them, in order to make advances to J. T. Weyman on the credit of the consignments. Four bills were accordingly drawn by Weyman on Coffin and Weyman for 40,000 dollars, payable to J. B. Clough or order, and, being indorsed "J. B. Clough," were discounted by the plaintiffs, who are a banking corporation duly constituted by the laws of the United States. It was further agreed between Clough and the consigner, J. T. Weyman, that the latter should draw other bills on Crowder, Clough, and Co., in order to provide Coffin and Co. with cash to pay the four bills on them when at maturity, which latter bills were to be paid by Crowder, Clough, and Co. out of the proceeds of the consignments in their hands. Bills were accordingly so drawn, and sold by Coffin and Co. to the amount of £5000, which house, however, stopped payment soon afterwards, and the proceeds of the bills were misapplied; and Crowder, Clough, and Co. soon afterwards failing, the bills upon them were not paid. All the consignments, however, agreed to be made by J. T. Weyman to the house in England were made, and received by the English house, and disposed of by them. Bills on England are not in general negotiable in Charleston, this was the cause of the arrangement for drawing bills in the first instance on Coffin and Weyman. The bills in question were duly presented to Coffin and Co. at maturity, and dishonoured, and due notice given to J. B. Clough in America. The value of the bills in question, in English money, is £3333, 6s. 8d. These par-

ticular bills were not entered by J. B. Clough in the books kept by him, because the agreement with J. T. Weyman was, that bills were to be drawn on Crowder, Clough, and Co. to such an amount as precisely to raise the amount of the four bills on Coffin and Co., and thereby exactly reimburse their payments; and as the bills so drawn would be paid in England out of the proceeds of the consignments, no profit or loss could arise to J. B. Clough or his partners from the sale of these bills on Coffin and Co. in America, and therefore no entry was made by J. B. Clough in the books kept by him. J. B. Clough had no separate estate. If the plaintiffs are entitled to recover, a \*verdict is to be entered for £416, 13s., the amount of the debt due from Crowder, Perfect, and Clough being £8333, 6s. 8d.; if not, a nonsuit is to be entered. [\*514]

*Parke* for the plaintiffs.—It is clear that the bills in question were indorsed in the course of the partnership business of Crowder, Clough, and Co., and to raise funds for partnership purposes. They were indorsed in the name of J. B. Clough, and the only question is, Whether that made him individually liable, or whether, under the facts found, that signature must be taken as the copartnership name? Now the case states, that all the business of the firm in America was carried on under that name. It is true that in *Ex parte Emly*, 1 Rose, 61, and *Emly v. Lye*, 15 East, 7, it was held that the indorsement of one partner does not make the firm liable, although the money thereby raised may be applied to partnership purposes, if the indorsement cannot be treated as the indorsement of the firm; but, on the other hand, it is clear that a firm consisting of several may carry on business in the name of an individual partner, and then the whole firm will be bound by acts done by him as representing the firm, *Ex parte Bolitho*, Buck. 100. The only question therefore is, Whether the name of J. B. Clough on these bills is to be treated as the copartnership name? Clearly it must, for all the business in America was carried on in that name, with the sanction of the partners in England, and the transaction in question was for the benefit of the partnership.

*Patteson*, contra.—This transaction was clearly a discount for the accommodation of J. T. Weyman, and not for the use of the partnership. If the name of J. B. Clough, in which the bills were indorsed, can be considered as the name of the firm, he by making that indorsement violated the instructions given when he went to America, in which it is expressly stated, "It is understood that our names are not to appear on either bills or notes for the accommodation of others, and that they should appear as little as possible on paper at all, and then only as regards direct transactions with the house here." Now, the authority of one partner to bind the firm, must depend upon \*the partnership articles. Here Clough had no such authority, the bills in question being [\*515] for the accommodation of others, and not regarding a direct transaction with the house in England. This mode of dealing might have rendered the firm of Crowder, Clough, and Co. liable to two sets of bills, those now in question, and the second set, drawn upon Crowder, Clough, and Co., and which, but for their failure, would have been accepted by them.

*Cur. adv. vult.*

The judgment of the court was now delivered by

Lord TENTERDEN, C. J., who after stating the case said,—Upon these facts it is contended, that the parties are to be charged as indorsers, that is, that the indorsement by J. B. Clough is to be considered as an indorsement by the house of which he was a member, and we think that, under the circumstances stated in the case, J. B. Clough is to be considered as the name of the firm for the purposes of business in America. That being so, the bankrupts and Clough were liable as indorsers of the bills; and a verdict must be entered for the plaintiffs for the sum agreed upon at the trial.

Postea to the plaintiffs.

1. "Suppose a partnership to be carried on in the sole name of one of the partners, and he at the same time should transact business upon his own separate account; and he should borrow money in his own name. In such a case the question may arise, Whether the partnership is bound for such borrowed money, or the individual partner only? And it must be resolved by taking into consideration the whole circumstances of the case. Thus, if the money is, in fact, borrowed for the partnership business, or it is, in fact, applied to the partnership business, in the absence of all controlling circumstances, the partnership will be bound therefor; since the fair presumption is, that it was intended [\*516] by the partner to pledge the partnership credit, and \*not merely his individual credit, whether the partnership was known or unknown to the lender. On the other hand, if the money was borrowed for the separate use of the individual partner, or actually applied to that use, the contrary presumption would prevail. But, if the business of the partnership were different from the separate business of the individual partner, and he should borrow expressly of the lender for the one business or for the other, the lender would be deemed to give credit to that particular business, and not to the other business; and then the partnership would or would not be bound according to the fact, whether it was borrowed for their business or not. And in such a case it would make no difference, whether the lender did or did not know that there was any partnership in either business, or whether the money was actually applied to the business for which it was expressly borrowed or not. But in the absence of all proofs as to the purpose for which the money was borrowed or to which it was applied, it would be deemed to be borrowed upon the separate account of the individual partner."—Story on Partnership, p. 216.

2. In an American case, *United States Bank v. Binney*, 5 Mason, R. 176, the court observed,—“In respect to both general and limited partnerships the same general principle applies, that each party has authority to bind the firm as to all things within the scope of the partnership, but not beyond it. Where the contract is made in the name of the firm, it will, *prima facie*, bind the firm, unless it is ultra the business of the firm. Where the firm imports on its face a company, as A., B., and Co., or A., B., and C., there the contracts made by the partners in that name bind the firm, unless they are known to be beyond the scope and business of the firm. But where the business is carried on in the name of one of the partners, and his name alone is the name of the firm, there, in order to bind the firm, it is necessary not only to prove the signature, but that it was used as the signature of the firm by a party authorized to use it on that occasion, and for that purpose. In other words, it must be shown to be used for partnership objects, and as a partnership act. The proof of the signature is not enough. The plaintiffs must go farther, and show that it is a partnership signature. In the present case, the signature of ‘John Winship’ may be on his own individual account, as his personal contract, or it may be on account of the partnership. Upon the face of the paper it stands indifferent. The burden of proof, then, is upon the plaintiffs to establish, that it is a contract of the



firm, and ought to bind them. And again, The notes are all indorsed in the name of 'John Winship.' For aught, therefore, that appears on the face of them, they were notes only binding him personally. The plaintiffs must, then, go farther, and show either expressly or by implication, that these notes were offered by Winship as notes binding the firm, \*and not merely on him- [\*517] self personally; or that the discounts were made for the benefit, and in the course of the business of the firm. It is not sufficient for the plaintiffs to prove, that the bank, in discounting these notes, acted upon the belief that they bound the firm, and were for the benefit and business of the firm. They must go further, and prove that that belief was known to and sanctioned by Winship himself, in offering the notes; and that he intentionally held out to them that the discounts were for the credit, and on the account of the firm; and that his indorsement was the indorsement of the firm, and to bind them; and that the bank discounted the notes upon the faith of such acts and representations of Winship. The jury will judge from the whole evidence how the case stands in these respects. The mere fact that the discounts so procured were applied to the use of the firm, is not of itself sufficient to prove that the discounts were procured on account of the firm. It is a strong circumstance, entitled to weight, but not decisive."

3. In another American case, *Etheridge v. Binney*, 1 Pick. R. 274, the court observed,—“Now, as the partner, whose name is assumed by the firm, may also engage in other branches of business, in which he may want credit on his own private account, if he applies for a loan of money to one who is ignorant of the copartnership, and no information is given of its existence, it is a private loan, and does not bind the firm, unless the creditor shall know that the money borrowed, or the goods procured by the individual went to the use of the firm. The burthen of proof in such case is upon the creditor, in order to make good his claim upon the firm; for he credited the individual, and not the firm, and it will be presumed to be for the private benefit of the individual, unless the contrary is proved. But if the existence of the firm is known to the person, who makes the loan, and representations are made to him by the borrower that he borrows for the use of the company, and that they are answerable for the debt, so that credit is given to the company, and not to the individual partner, the burthen of proof is upon the company, when sued, to show that the power confided to the individual has been abused, and that the money borrowed was applied to his private use, and also that this was known to the lender to be his intention. This principle necessarily follows from cases settled. If a purchase is made in the name of a firm, or money borrowed, and a note given or indorsed in that name, this is *prima facie* evidence of a debt from the firm, and it can only be rebutted by proof in the defence, that this was fraudulently done by the individual partner for his own private use, and that this was known to the creditor. So that in the limited partnership, if the name of the firm had been John Winship and Co., or Winship and Binney, all notes given to any creditor, in either of \*those names, would be company notes, unless disproved, as [\*518] before stated. Now, the making and offering of such a note is nothing more than a representation that the money is wanted for the use of the company, and as they confide in the individual they will be bound by his acts. The name of the firm here being only the name of the individual, a note offered in that name, unaccompanied by any representation, would of course import only a promise by John Winship alone; and the credit being given to him alone, the creditor would not recover against the firm, without proving that the money actually went into the funds of the firm. But if the borrowing partner states that he is one of a company, and that he borrows money for the company, or purchases goods for their use, then, as there is such company, and as they give him authority to use the company credit to a certain extent, and as the creditor will have no means of knowing whether he is acting honestly towards his associates, or otherwise, if he lends the money or sells the goods on the faith of such representation, the company will be bound, unless they prove that the contract was for his private benefit, and known to be so by the creditor.

WHERE SEVERAL PARTIES ENGAGE IN A JOINT ADVENTURE FOR THE SALE OF GOODS TO BE CONTRIBUTED BY THE SEVERAL PARTIES RESPECTIVELY, THE PARTNERSHIP IS NOT HELD TO BE CONTEMPORANEOUS WITH THE PURCHASE OF THE GOODS BY THE SEVERAL PARTIES, AND THE WHOLE PARTNERS ARE NOT LIABLE FOR THE PURCHASES MADE BY EACH OF THE PARTIES.

# I.—SAVILLE v. ROBERTSON.

June 15, 1792.—E. 4 T. R. 720.

THIS was an action for goods sold and delivered, brought under the following orders of the lord chancellor, made upon the petition of the plaintiff and others in the bankruptcy of the defendants :—" I do order that the petitioner W. Saville be at liberty to prosecute such action at law as he shall be advised for the value of the said copper, &c. ; in the defence to which action the said bankrupts are not to set up their bankruptcy ; and all books, &c., to be produced, &c., and all further directions on the matter of the petition are hereby reserved until \*after [\*519] the trial, &c., dated 2d August 1790."—" I do order that the petitioner W. Saville be at liberty to try the said action for goods sold and delivered, as directed by my order made in this cause on 2d August, 1790 ; with liberty, if the court wherein the said action shall be tried shall think fit, to give the said bills in evidence without prejudice to the form of the action, as now directed ; and all further directions, &c., reserved, &c., dated 7th May, 1791."

At the trial a special case was reserved, which stated as follows :—In April, 1787, the defendants and one Samuel Pearce, since deceased, and William Robertson, since a bankrupt, entered into the following articles of agreement. Articles of agreement made this 19th of April, 1787, between J. Robertson and J. Hutchinson of London, merchants and co-partners, as well on the part and behalf of themselves as of others who have or shall subscribe their names on the back of these presents, of the one part, and S. Pearce, of, &c., merchant, of the other part, &c. Whereas the said S. Pearce is the sole owner and proprietor of the ship *Triumph*, &c. ; and whereas the said J. Robertson, J. Hutchinson, S. Pearce, and others, who have subscribed their names on the back of these presents, have mutually agreed upon a joint undertaking and risk as to profit and loss, in a certain voyage or maritime adventure about to be performed under the direction of the said parties who have or shall have a majority of interest therein, or of a committee appointed by them ; now these presents witness that they the said J. Robertson and J. Hutchinson on behalf of themselves, and all others who have or shall subscribe, &c., and the said S. Pearce for himself, in consideration of the trust which they severally repose in each other, and also in pursuance of the said agreement, have and do each for himself, his heirs, executors, &c., mutually covenant and agree with each other, &c. :—1st, That the said ship *Triumph*, whereof the said S. Pearce is sole owner, shall,

from the day of the date and until her return from her intended voyage, be at the disposal, direction, and risk of all the said parties hereto jointly, at the valuation of £3750, &c. ; 2d, That the said J. Robertson and J. Hutchinson, by themselves and others, who have or shall subscribe, &c., shall \*and will, on or before the 24th August next, procure and provide a cargo of goods for the said intended voyage, to the [\*520] value of between £22,000 and £25,000 ; and which goods shall, in the judgment and opinion of the majority of the parties to these presents be deemed eligible and proper for the voyage and markets ; and that the said goods shall be furnished or purchased at the lowest cash prices, although not payable till the usual period of credit is expired ; the difference between the said cash terms and the given credit to be made good by giving bonds, bearing interest from the date of the contract of such goods ; and that they the said J. Robertson and J. Hutchinson, and other the persons who subscribe, &c., shall and will prepare and ship the said cargo, at such time and in such manner as the majority of the said concerned, or their committee, shall direct :—That all additional outfits of the ship *Triumph*, in cables, &c., which she may require, &c., after the date hereof, &c., until her voyage be concluded, shall be on the joint account, &c. ; 4th, That in case the said S. Pearce shall be desirous to increase his interest in the said joint concern, he shall be permitted so to do, by shipping on the joint account as many goods, over and above the goods to be shipped by the said J. Robertson, J. Hutchinson, and others who shall subscribe, &c., as he may think proper ; but the said goods so to be shipped by the said S. Pearce are to be such articles as the majority of the concerned or their committee shall approve of as proper for the voyage and market ; 5th, That the said £3750, together with the amount of the additional outfits to be advanced by the said S. Pearce, the amount of half of the premiums of insurance to be made by the said S. Pearce on the said ship, freight, and cargo, and such amount of goods as the said S. Pearce may ship on the joint account as above-mentioned, shall be considered as the said S. Pearce's share or capital in the said joint undertaking ; and he the said S. Pearce shall be entitled to receive the profit or bear the loss thereon, in the exact proportion as the amount of all such sums shall be to the remainder or other part of the said joint concern ; and that the said J. Robertson and J. Hutchinson, and the subscribers, &c., shall receive the profit or bear the loss in the like proportion as to the sums set opposite to their several names ; 6th, Provided \*that S. Pearce shall get the insurances [\*521] effected, and guaranty the solvency of the underwriters if called upon ; and when the policies are effected, each of the said parties is to hold his own respective proportion thereof, to the amount of his share and interest in the said joint concern ; 7th, Although the said S. Pearce is to procure the whole of the said insurances on the said ship, freight, and cargo, yet only half of the premiums of insurance shall be added to his interest in the said joint concern, pursuant to the 5th article ; but all the said parties hold themselves bound with him to be answerable for the whole amount of the said premiums of insurance, and which is to be a charge on the voyage ; 8th, That S. Pearce shall be the ship's hus-

band to superintend such outfits of the said ship as the majority, &c., shall deem necessary. [The 9th relates to a schedule of the ship's tackle, &c.] 10th, That all money received on account of the ship, &c., shall be paid to the supercargo on the joint account; 11th, That in case the said S. Pearce shall want the assistance of the said J. Robertson and J. Hutchinson, or the subscribers, &c., to procure him the loan of any money, to enable him to complete the outfits, they engage to procure him £500, to be repaid by him in manner as therein stipulated. [12th, Not material.] 13th, That from and after the said ship shall leave the port of London, all the expenses on the voyage shall be paid by the supercargo or agent for the said joint concern, who shall be supplied with money for that purpose, or be empowered to pay the same out of the proceeds of the cargo; and if the said supercargo during the voyage is under the necessity of drawing bills on either of the said parties for the same, or he shall think the drawing such bills more beneficial to the joint concern than reimbursing himself out of the said proceeds, then each of the said parties interested in the said maritime adventure, shall bear and pay his respective portion of such bills; 14th, That the parties hereto, or a committee, shall appoint officers of the ship; 15th, That when the ship is ready laden for sea, and previous to her sailing, J. Robertson and J. Hutchinson shall deliver an invoice of her cargo to the supercargo, who shall enter the same in proper books; and each party interested shall be therein credited with the amount of his respective [522] accounts; and the supercargo shall prepare a statement of the whole amount of the said ship, outfits, cargo, and charges, declaring the exact proportions or shares which each person hath in the voyage, which shall be signed by each of the parties, and shall be a voucher for ascertaining the said shares hereafter, in profit and loss; 16th, That in case of any difference between any of the parties interested, it shall be referred to arbitration; 17th, That each party shall bind himself in the penal sum of £2000 for the performance of the articles. Signed and sealed by J. Robertson, J. Hutchinson, S. Pearce, and W. Robertson.

On the 28th July, 1787, the following memorandum was indorsed on the said articles by the same persons :—"Notwithstanding what may be understood to be the meaning of the foregoing articles, it is hereby declared by all the parties, that the minute made on the 26th June last, and signed by us respecting each of us, holding the proportions of one quarter each, that is to say, Robertson and Hutchinson one half, and S. Pearce and W. Robertson one quarter each, it is now fully to be considered and understood, that that minute is now declared null and void, and that each party whose name is hereunto subscribed is to hold no other share or proportion in the said concern than the amount of what each separately orders and ships; and which interest will be hereafter declared agreeably to the true intent and meaning of this agreement; and it is further declared, that the orders given for the cargo and outfit of the ship are to be separately paid; and that one is not bound for any goods or stores ordered or shipped by the other; and that the said S. Pearce has free liberty to ship what goods are suitable to the voyage, over and above the

ship and outfit, leaving room clearly for those ordered by Robertson and Hutchinson, and W. Robertson; and it is to be understood that the ship is made over in trust for the general concern." In May, 1787, the plaintiff, by the orders of Pearce, supplied copper to sheath and repair the ship *Triumph*, to the amount of £482. In August, 1787, the plaintiff, by the orders of Pearce, delivered copper on board the said ship to the amount of £238, 3s. 3d., which formed part of the cargo thereof. In October, 1787, the said ship sailed from London for Ostend; [\*523] \*and proceeded from thence to the East Indies with the goods so furnished by the plaintiff, and other goods on board. In January, 1788, Pearce became a bankrupt, and Saville proved his debt under the commission against him; and in February, 1788, William Robertson also became a bankrupt. On the trial, Mr. Kaye, the plaintiff's attorney, and who was solicitor to Pearce's assignees, swore that the defendant Robertson told him that in September, 1789, there had been an agreement between him (Robertson) and Pearce's assignees, that he should go down to the coast to wait the ships return from India; on her arrival, he was to send word to the assignees, one of whom was to accompany him in the ship to Ostend; and there the ship and cargo were to be sold for the parties interested: That when the ship arrived, which was in July, 1789, he (Robertson) went on board, and, without sending advice to Pearce's assignees, carried her to Ostend, and sold her for his own and Hutchinson's benefit: That his reason for not keeping his engagement with Pearce's assignees was, that he and his partner were liable to pay the whole debts for ship and cargo; and therefore he had possessed himself of the whole to answer those debts; and if there were a surplus, he would account to Pearce's assignees for a proportion of it. On the 29th October, 1789, the defendants accepted two bills of exchange of that date, for the amount of the copper supplied by the plaintiff, drawn by the plaintiff, payable two months after date; and stated to be for value delivered in copper to Messrs. S. Pearce and Co. In January, 1790, before either of the bills was paid, the defendants became bankrupts.

This case was argued in the last term by Adam for the plaintiff, and Burrough for the defendants; and again on this day, by Bower for the former, and Bearcroft for the latter.

It was admitted that the plaintiff was entitled to recover for the copper for sheathing.

It was argued for the plaintiff, 1st, That the defendants were liable for the rest of the goods, as partners, on the construction of the articles, coupled with their subsequent acknowledgment, and their acceptance of the bills of exchange, drawn for the \*very goods; and these cases were cited, *Abbott v. Smith*, 2 Bl. Rep. 947; *Bloxam v. Pell*, [\*524] cited in 2 Bl. Rep. 999; *Hoare v. Dawes*, Dougl. 371, 3d edition; and *Coope v. Eyre*, H. Bl. Rep. 39. But 2dly, If the plaintiff could not recover in an action for goods sold and delivered, that the defendants were liable on their acceptance of the bills; and that the lord chancellor intended by the second order to give the plaintiff an opportunity of recovering either in the one form or the other.

These points were resisted by the counsel for the defendants; the first

on this ground, that the defendants were not partners at the time when the contract was made; and that, though their subsequent acts might explain the original contract, if it were doubtful at the time, they could not alter the original contract against the intention of the parties, as expressed in the articles. On the other hand, it was said that the meaning of the order was only to permit the bills to be given in evidence to explain the intention of the parties on the whole transaction; but not to make the bills the foundation of the action, which was expressly ordered to be brought to recover the value of the copper.

Lord KENYON, C. J.—Some of the points made at the bar admit of no doubt. It is clear, that if all these parties had been partners at the time when these goods were furnished, though that circumstance were not known to the plaintiff, they would all have been liable for the value of the goods. It is equally clear, that such an action might be maintained against the dormant partners alone, unless they pleaded in abatement. Nor can any doubt be entertained, but that, if this had been an action on the bills of exchange, the plaintiff might have recovered: there was a consideration for them; and being in writing, the Statute of Frauds would have been satisfied, though they were promises to pay the debt of another person. But my difficulty arises from the form of this action, which is for goods sold and delivered; for I do not see how any act, which passed subsequent to the delivery of the goods, can have any retrospect so as to alter the nature of the contract, which was not doubtful. It might have been evidence to explain it to be <sup>a</sup> partnership-  
[\*525] ship-contract, if the contrary had not expressly appeared. The facts of the case are shortly these:—Several persons, who had no general partnership, nor any connection with each other in trade, formed an adventure to the East Indies. The outfit of a vessel was a joint concern of all the partners; and that delivers the case from one consideration, namely, the parcel of copper for sheathing the ship; which is admitted to be a partnership concern. But beyond that, I see no partnership between the parties till all the parcels of the cargo were delivered on board; and that made it a combined adventure between all the parties. It was very properly asked, in the argument, If they were partners when the cargo was delivered, what share had Pearce? By the articles, he was not to bring in any definite aliquot part of the cargo; but the agreement only was that he should share in proportion to the part he should bring in: it was optional in him whether or not he would bring in any goods; and by another part of the agreement, if he were under any difficulty in bringing in the money, the others were to lend him credit. It is true, that it was to be determined by a majority of those concerned in the adventure, Whether the goods, which were to be sent to market, were or were not proper?—and so far they all looked to each other's acts: but each of them was to bring in his share only; and I cannot distinguish this case from that put at the bar, where several persons were to contribute their separate quota of money, and they applied to different scribes to procure it: they could not all be liable for the capital which each should borrow. At the time when this copper was furnished, Pearce stood in no relation whatever to the other persons; but he alone bought

the copper in his own name, without carrying to market the name of any other person but his own. Suppose the plaintiff had brought an action for this copper the instant it was delivered on board, against whom must the action have been brought? Pearce only; for he alone was answerable at that time. I cannot therefore see how it can be said that these goods, which were sold to Pearce only, and on his sole credit and account, were sold and delivered on the partnership account. Afterwards, indeed, these defendants were to gain or lose by the joint cargo; when the other goods were \*brought in, the partnership arose; but each was to bring in his own particular stock. But in this case I think that [\*526] the question stops short of affecting the defendants; and I cannot see how the plaintiff can have a right to call on the defendants, as partners, for the value of these goods, on a supposed contract, when the real contract between the buyer and seller was consummated before the joint risk began. Suppose several persons agreed to open a banker's shop, and it was agreed that each partner should bring into the house a certain sum of money as his share, it could not be contended that if one of them were to borrow money for his share, all the others would be liable for it.

The great question however still is, Whether, under all the circumstances of the case, all these parties are answerable? I think they are; but they can only be adjudged to be responsible in another form of action, and not in this, which is an action for goods sold and delivered. If the action had been brought upon the bills, I think they would have been liable.

ASHHURST, J.—This case comes before us much entangled in the form of it; but at present, the inclination of my opinion is, that, even in this form of action for goods sold and delivered, the plaintiff may recover. I admit that evidence subsequent to the contract cannot vary the nature of the contract, but it may explain the intention of the parties to the original contract. If the ordering of the goods by Pearce was the only evidence in this case, he alone would be answerable for the payment of them; but, when he bespoke them, it is clear that he did it with a view to a partnership transaction; and that this was a joint concern was shortly afterwards explained by the memorandum of July, 1787, which is indorsed on the articles; both of which must be taken into consideration together, in order to see the nature of the contract. The 4th, 5th, and 15th articles are strong to show that this was a partnership concern. By the fourth, Pearce was to be at liberty to ship on the joint account as many goods as he chose, provided they were such as the majority of those concerned should approve. Now if this were not intended to be a partnership account, the rest of those concerned in the adventure could have no interest or concern \*in the goods shipped by him; but if they [\*527] were all to share in the profit and loss of the whole adventure, then there was good reason why they should have an opportunity of approving of those goods. The 5th article shows this still more strongly; it is, that the £3750, &c., and such amount of goods as Pearce may ship on the joint account as above mentioned, shall be considered as Pearce's share or capital in the said joint undertaking; and that he shall be entitled to receive the profit or bear the loss in proportion, &c., on the joint concern. Now a partnership is a joint undertaking to share in the

profit and loss; but such was this undertaking: it was not only a joint concern in the ship, but also in the cargo. The 15th article also is material; which directs that, previous to the ship's sailing, books shall be kept, in which each party interested shall be therein credited with the amount of his respective accounts, and that the books shall be signed by the parties, which shall be a voucher for ascertaining the shares hereafter in profit and loss. Now that clearly evinces what was the original intention of the parties. It is true that when the contract was made, the goods were not furnished on the joint credit of Pearce and the defendants, but of Pearce alone; but that is the case with dormant partners, and there the party furnishing the goods may resort to all those who are entitled to share in the profits; for though in such case the dormant partners may not be known at the time of the contract, yet when that fact is ascertained, the creditor has a right to avail himself of that evidence. The evidence of Kaye likewise is important; for he proved an acknowledgment by one of the defendants that they were liable to pay the whole debt for the ship and cargo. This shows that they considered themselves as partners in the original transaction; and though subsequent evidence will not make a new contract, it may explain what that contract was. However, if this opinion be not well founded, the plaintiff would be entitled to recover on the bills of exchange.

BULLER, J.—It is for the interest of all the parties that we should now dispose of the case before us, whatever may be done hereafter in the Court of Chancery; for, if the grounds on which we proceed be distinctly known, it will put an end to \*further litigation. The only [\*528] difference of opinion between my lord chief-justice and myself, arises on the last order of the Court of Chancery; but that order, I think, will be best explained hereafter by that court. If this be considered purely as an action for goods sold and delivered, brought adversely in a court of law, and unconnected with the proceedings in the Court of Equity, I entirely agree with my lord that the plaintiff cannot recover against these defendants the amount of Pearce's share of the cargo. To make this case clear, suppose these defendants and Pearce had agreed to be concerned in a joint adventure, in which they were to be interested according to the proportion which each furnished, and that each were to bring in goods to the amount of £900; and suppose the two defendants had paid for their shares, and Pearce had not, and that the defendants were also to be liable with Pearce for his share, in that case they would be liable for £900 each more than Pearce, and would not be entitled according to the proportion which each brought in. In the argument an attempt was made to distinguish between the time of the contract and the time of delivery: it is certainly true that if one partner order goods himself, without disclosing the names of the other partners, and the goods be afterwards delivered to them all, they are all liable, because the delivery and the sale are considered as forming one entire contract, and the delivery is supposed to be according to the sale. In such a case the one partner, who buys the goods, does not contract for himself, but on account of the partnership. In that way of considering the question, upon the first order of the Court of Chancery, I think the plaintiff could



not recover against these defendants for the amount of the goods sent in August, as Pearce's share, in an action at common law for goods sold and delivered; because the goods were neither sold nor delivered to the partnership; but that would be to dispose of the case according to the mere form of the action.

But, according to my construction of the second order, we are not to consider the question in that light; for it is ordered that the plaintiff may give the bills in evidence, without prejudice to the form of the action; and therefore I think that this case is to be considered on the broad ground of substantial \*justice. This lets in the other question, [\*529] Whether, if the action had been brought on the bills, the plaintiff would not be entitled to recover? and that he would, I think no doubt can be entertained, for the bills of exchange were given for a good consideration. The defendants took possession of the cargo, declared themselves liable for the amount, and accepted bills expressly drawn for the value of the cargo; and therefore upon those bills the plaintiff might unquestionably recover.

Considering this as an action brought under the direction of the Court of Chancery, I think it is our duty to state the law upon the whole of the case.

GROSE, J.—We must consider this case, as the record states it to be, as an action for goods sold and delivered; and I cannot distinguish it from that put in argument, of several persons agreeing to enter into partnership, each bringing in a stipulated sum of money, and each borrowing his proportion of different persons; in which case it is impossible to say that the persons advancing the money could maintain actions against all the partners for the several proportions lent to each; but if the question were, Whether any action would lie? I have no doubt but that the plaintiff might recover against the defendants on the bills of exchange, which are written contracts, and were given for a valuable consideration, the defendants at that time being in possession of the whole of the cargo.

Lord KENYON, Ch. J., then said, he hoped it would be remembered, when this case was returned into chancery, that this court were unanimously of opinion, that, on the whole justice of the case, the plaintiff was entitled to recover.

## . II.—VENABLES v. WOOD.

March 8, 1839.—S. 1 D. 659.

IN 1834, William Venables and others, partners of Venables, Wilson, and Tyler, stationers, London, sold several parcels of \*paper to the order of John Wardlaw, bookseller and stationer in Edin- [\*530] burgh. The whole of these were invoiced to "Mr. John Wardlaw." The amount of the price for the whole was £151, 10s., which was settled

by a payment of 30s. in cash, made by Wardlaw, and by three bills, each for £50, drawn by Venables, Wilson, and Tyler, upon Wardlaw, on March 1, 1835, payable at four, six, and eight months. Wardlaw accepted these bills, and retired the first two. But he was unable from insolvency to retire the third; and in October, 1835, he executed a trust-conveyance for behoof of his creditors. Part of the paper had been used in printing a work, entitled the *Secession Magazine*, of which Wardlaw was the publisher. Part of it had been used in printing an edition of two works composed by John Wood, advocate. Venables, Wilson, and Tyler, along with a mandatory, raised an action against that gentleman, concluding for payment of a balance of £36, 15s., as remaining due to them, after deducting a dividend received from Wardlaw's estate, alleging that the defender was a partner or joint-adventurer with Wardlaw in the publication and sale of the works for which the paper had been used, and that he was therefore liable as for a partnership debt.

Defences were lodged, and a record was made up, after which the following issue went to trial:—

"It being admitted that the pursuers furnished to John Wardlaw, bookseller and publisher in Edinburgh, the paper charged for in the account No. 4 of process:

"Whether the whole or any part of the same was used in the printing of certain books; and whether John Wood, defender, was a joint-adventurer with the said John Wardlaw in the publication and sale of the said books, and is indebted and resting-owing to the pursuers in the sum of £36, 15s., or any part thereof, with interest thereon, as the balance of the price of the said paper?"

On March 22, 1836, the defender had made a claim on Wardlaw's estate in terms of the following account:—

[\*531] \*"John Wood, Esq., advocate, in account with John Wardlaw, bookseller, Edinburgh.

| <i>Dr.</i>         |            | <i>Cr.</i>                      |            |
|--------------------|------------|---------------------------------|------------|
| 1835.              |            | 1834.                           |            |
| July. To cash, .   | £120 0 0   | Dec. By balance due Mr. Wood as |            |
| " Books, &c.,      |            | per former                      |            |
| as per ac-         |            | statement, £227 12 8½           |            |
| count, .           | 15 18 7    | 1835.                           |            |
| " Balance due      |            | Oct. By profits on              |            |
| Mr. Wood, 375 0 5½ |            | Sessional                       |            |
|                    |            | School-books                    |            |
|                    |            | to this date, 283 6 4           |            |
|                    | <hr/>      |                                 | <hr/>      |
|                    | £510 19 0½ |                                 | £510 19 0½ |
|                    |            | Balance, £375 0 5½"             |            |

An affidavit by the defender was subjoined to the account, bearing that Wardlaw was justly addebted in the amount to him. In the accounts between Wardlaw and the defender, relative to the works written by the defender, and published by Wardlaw, as entered in Wardlaw's

books, there was exhibited, on one side of the account, the number of copies of an edition of each work that were sold, and the price of these, which formed the charge against Wardlaw. On the other side of the account were stated the expenses of the paper, the printing, and the stitching or binding of these copies; then there was a commission of 10 per cent. stated to the credit of Wardlaw; and the balance was next entered under the head of "Profit," so as to square the two sides of the account. Accounts, embracing several editions of a variety of works, and extending over a series of years, had been settled between the defender and Wardlaw, which included this "profit" as one of the items; and, in the balance claimed by the defender against the estate of Wardlaw, similar "profits" were stated as due to the defender. A separate agreement was made by Wardlaw and the defender as to the printing and publishing of each edition of a work.

In making up the record, the defender made the following \*statement of the nature of his right to "profits." After mentioning [\*532] that he had compiled various books for improving the system of education in the Edinburgh Sessional School, and chiefly written for the benefit of that institution, he stated that he "retained the copyright of these books, and sold to Mr. John Wardlaw, bookseller in Edinburgh, each edition as it was required. The conditions were, that the defender was to receive from Mr. Wardlaw, as his remuneration for the use of the copyright, one-half of the clear profits in the event of any profit being realized, after allowing a commission of 10 per cent. for the sale; but that he was to bear no share of the loss, and that Mr. Wardlaw was to undertake all liability for the risk, as well as the whole responsibility and trouble of the publication. Contracts of this kind, containing similar conditions, are very common between authors and publishers." The defender also alleged, that he never understood he was engaged in any partnership or joint-adventure with Wardlaw, and that he accordingly knew nothing of the details as to the manner in which the paper was ordered or paid, or the expenses of printing, &c., were settled.

The pursuers averred, in answer, that the books were published by Wardlaw and the defender in partnership, or joint-adventure, at their mutual cost and risk.

At the trial, which came on before the lord president, the defender stated:—"That he waived any objection that might be competent to him, to the examination of Wardlaw as a witness; and further, he admitted that the paper in question was used in printing an edition of two of the defender's works,—that the affidavit and claim of the defender on Wardlaw's estate, included a claim for profits on these two editions, and that the sum in the issue, being for the price of the paper mentioned in the said issue, is still unpaid to the pursuers."

On this evidence, the pursuers maintained before the jury, that they had established a case of partnership, or at least of joint-adventure between Wardlaw and the defender, so far as regarded the publication and sale of the two editions, in printing which their paper had been used. Participation of profits \*was of the essence of partnership. In this case, after deducting the whole expenses of the printing and [\*533]

publishing, the net profits were divided equally between the parties. The defender's own statement was, that he was to draw "one-half of the clear profits," if there were profits. There had been profits realized, and the defender had claimed his share. This was not merely the case where a sum was made payable which was contingent, in amount, upon the extent of profit realized; it was an actual half of the clear profits, drawn directly as profits; and that sufficed to create the liabilities of partnership or joint-adventure. The price of the paper used for the joint-adventure was a debt due by both the joint-adventurers, *singuli in solidum*, and the defender was liable to pay it.

The pursuers also stated that they had not called Wardlaw as a witness, because it was quite unnecessary for them to do so. But the defender might have called him, and should have done so, if he wished to overcome the presumption of partnership necessarily arising from participation of profits.

The defender maintained:—(1.) That as the pursuers had not called Wardlaw, and had thus refrained from adducing direct evidence as to the existence, or the conditions of the alleged joint-adventure, and had betaken themselves to the mere circumstance, that the defender was to participate in the profits, they could not succeed in their action, unless it was to be held as an absolute and universal rule, that wherever there was any participation of profits, there was always partnership or joint-adventure. But there was no such absolute rule. There were many classes of cases where parties shared in profits without becoming partners; as where sailors in Greenland ships received, besides wages, a percentage on the profits; or where clerks, in addition to a salary, received such percentage, 2 Bell, 649. (2.) Wardlaw was a stationer and bookseller in Edinburgh, dealing on his own account with the pursuers. He gave his orders, and accepted bills for the paper, in his individual name. When he received the paper in question, it was in his own absolute power to have appropriated the whole, as he undoubtedly appropriated part, for printing other works. But he made an agreement with the [534] defender, that, if allowed to \*publish an edition of one of the defender's works, he, Wardlaw, should take on himself the whole trouble, risk, and expense, and after deducting a commission of 10 per cent., should pay over half of the profits to the defender. The purchase of paper from the pursuers was no part of that agreement, but a separate transaction between Wardlaw alone and the pursuers. In making that purchase, Wardlaw was not acting as institor for the defender and himself, but acted, both truly and ostensibly, for himself alone. Therefore, even if the separate agreement between Wardlaw and the defender had constituted a joint-adventure, the defender would not have been liable to the pursuers, because the paper was not bought on account of the joint-adventure, nor on the credit of the joint-adventurers, nor by any authority express or implied from them, but solely by Wardlaw as an individual.

But there was not any case of actual joint-adventure at all. The transaction between the defender and Wardlaw was a mere sale. The defender sold to Wardlaw the right of printing one edition of two works,

and Wardlaw undertook to pay, as the price of that privilege, one-half of any profit which he might realize by the sale of the books. In the same manner, if the author of a play sold the privilege of representing it for a given number of nights to the manager of a theatre, on condition of receiving a proportion of the sums drawn at the door, after deducting the expenses of each night, that sale would not subject such author in the liabilities of a partnership or joint adventure, to any extent. It might be that the consideration stipulated for by the defender, was of an uncertain and contingent amount, and might even be nothing at all, if there were no profits; but it left the defender still the mere seller of a privilege to Wardlaw—the privilege of printing one edition of the work.

The LORD PRESIDENT delivered it “as his opinion and direction to the jury, that, on the evidence led by the pursuers, the said defender was, in point of law, entitled to a verdict; whereupon the counsel for the said pursuers did then and there, on behalf of the said pursuers, except to the foresaid opinion and direction of the said lord president, and did maintain that the \*said lord president should not have given the said opinion and direction to the jury in point of law.” [\*535]

The jury found for the defender. The pursuers presented a bill of exceptions, and counsel were heard on it.

LORD GILLIES.—At first I thought this case involved a question of considerable doubt and difficulty. But, on full consideration of it, I am of opinion that the direction given at the trial was right, and that the bill should be disallowed. I am not aware that there is any case in the books which is precisely similar to this, though there are some that are of an analogous character. In the absence, then, of any direct precedent, we must have recourse to general principles. In a case of proper copartnery, where an advance is made for behoof of the copartnery, the creditor making it is entitled to hold all the partners liable to him, whether he knew them all at the date of making the advance or not. There are many points of distinction between a case of proper partnership, and a case of joint-adventure; but still it is not necessary, though it may be desirable, in regard to joint-partnership, to show that a party making advances to the joint-adventure, trusts to all of the *socii*, and not to some of them exclusively. But I am not prepared to hold this a case of joint-adventure. In a joint-adventure, the common view of all is profit. But the defender, in transacting with Wardlaw, looked like other authors, not to speculative profit on a mercantile adventure, but to obtaining a fair price or remuneration for his talents and labour. Had it been published to the world, that he was to have a share in the profits of the publication, and had this been notified to the pursuers when the paper in question was ordered from them, the case would have borne a different aspect. But no such notice was given. Wardlaw ordered the pursuers to send him a quantity of paper; and they did so on the order of Wardlaw. They did not know to what purposes the paper was to be applied. It was not bought specially for the work in question. It might as well have been applied by Wardlaw to any other work whatever. It was just a sale of paper between Wardlaw as an individual on the one hand,

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[\*536] and the pursuers on the other. \*The pursuers had no debtor to look to but Wardlaw, and I can see nothing in the separate transaction between Wardlaw and the defender, the object of which was to give the defender a remunerative price for his labour, which can render the defender liable to the pursuers.

LORD MACKENZIE.—I have come to the same conclusion; but in doing so I have by no means found the case to be free of difficulty. On the proof it is a very narrow case; it comes very near to the confines of the liability of proper partnership, but I think it is not brought within these confines. Wardlaw was a stationer, bookseller, and publisher of books. The defender was the author of several books. The defender made over to Wardlaw the right of printing and publishing one edition of certain works—the copies of this edition to be the property of Wardlaw—and Wardlaw undertaking the expense of paper, printing, publishing, and selling, but being bound to pay over to the defender one-half of the profits realized by him, after deducting all expenses, and a charge of 10 per cent. in name of commission. Wardlaw purchased paper in his own name from the pursuers, and he applied part of the paper to the printing of the books of the defender. He subsequently became bankrupt; the pursuers have sued the defender for the price of that part of the paper which was so used; and two questions have been raised for our determination. 1st, Is there any evidence of a joint-adventure at all? 2d, If so, have the pursuers any right to come on the defender as for a debt due by the joint-adventure? On both of these questions, my opinion is in favour of the defender.

1. I do not think enough is established to constitute a joint-adventure. I do not think it necessary to go into nice distinctions respecting the nature of a joint-adventure, which is a limited copartnery, but still a copartnery. It does not appear to me that any copartnery at all is made out in this case. The mere circumstance that an author has made over the copyright of his work, or the privilege of printing one edition of it, on condition of getting a share of what have, in this case, been called “the clear profits,” will not necessarily make copartnery. There are [\*537] whole classes of cases in which one party supplies \*his labour or skill on condition of obtaining a share of the profits even of an existing concern, without being made a partner, merely by having hired his labour or skill upon these terms. In various cases it has been held that servants, or clerks, or sailors on a Greenland voyage, or captains of ships, though entitled to a share of the profits of their employers, in return for their skill or labour, were not thereby made copartners with their employers. That has been undoubtedly established as the law of England, and it is equally the law of this country. But if so, I can see no solid distinction between the supplying of that skill or labour, and the defender’s supplying his authorship. I can see no sound distinction between the case of a person supplying his labour directly, or supplying it indirectly, by handing over the product of it, or a certain use of that product. Looking to the ordinary definition of partnership, that given by Heineccius, (*contractus consensualis, de re vel operis communicandis, lucri in commune faciendi causu*, Elem. Jur. Civ. secundum ord. Inst. L. III. t.

26, § 942,) it will not apply to such a case as the present. In an agreement of this kind, the author is not, in the ordinary way, a sharer of the profit or loss of the concern. The profits, of which a share is to be paid him for his work, are not the ordinary or proper profits of the concern. Take it that a book was a valuable work, worth £500, and that the copyright of it was sold to a bookseller for half of the nominal profits arising from the sale, as in this case: these nominal profits, computed by deducting the cost of paper, printing, &c., but without setting down the value of the work itself at any sum, might perhaps be £100, while in truth there had been no real profit, but loss of £400 on the whole concern. In a case of proper partnership, the value of the work which was contributed would require to be stated as so much input stock, and would require to be deducted from the gross proceeds of the sale, before any "net profits," in the proper sense of that term, could be struck. But the word "profit," in the accounts between the defender and Wardlaw, is not used in that sense. It is merely used to denote the amount of certain receipts in the business, under certain deductions, to serve as a measure of payment to the author. The substance of the transaction was to pay the defender according to a particular \*form for his labour; to pay him a price for his authorship, which price was to be ascertained in a [\*538] particular mode. But still it was only a contract of sale as between Wardlaw and the defender. Suppose that the price offered by Wardlaw had not been a share in the profits of the sale of the work itself, but a share in the profits of the sale of some other work; or suppose that the price was to be paid according to the amount of profit which might be realized by another bookseller in selling off a prior edition of the same work, that agreement would not have made the defender a partner with such other bookseller, or a partner with Wardlaw in the separate work. It would not have given the defender any interest in the direction or management of these other works or editions, or any right or privilege of copartnery in them; it would still have been merely a particular mode of fixing the price of the book sold by the defender to Wardlaw. It would still have left the transaction between Wardlaw and the defender a mere contract of sale; and I think that the actual case before the court is the same in principle with either of these. I hold, therefore, that no case of partnership or joint-adventure is made out.

2. But even if I thought there was a joint-adventure established against the defender, I do not think he would be liable to the pursuers' present claim. Wardlaw was a stationer and bookseller. He purchased paper in his own individual name from the pursuers, and he used part of that paper in printing the editions of the defender's works now in question. If Wardlaw made the bargain with the pursuers for the purchase of their paper, before he made the bargain with the defender, there could be no difficulty, as the defender would clearly be free of all liability to the pursuers. The precise dates do not appear in evidence. But even although Wardlaw bought the paper after he had made his bargain with the defender, and though that bargain should be held a joint-adventure, still Wardlaw was not institor of the joint-adventurers. He bought the paper by himself, and for himself alone. From all that

appears, the paper so bought was no company stock, no joint stock when bought, but might have been disposed of by Wardlaw himself, absolutely at his pleasure. If paper had risen greatly in the market, there [539] was nothing to hinder him from \*buying new paper for this work, and applying the whole paper bought from the pursuers in any other way that he chose. Holding, therefore, that he bought for himself, I do not consider that what was done subsequently with part of that paper, created any liability by the defender to the pursuers. Some of the decisions in the coaching cases come very near to this. Where a general contract was entered into, to horse a coach along a certain line, and where sub-companies were formed, a portion of the line being allocated to each, and furnishings were made of corn and hay for the horses of one of these sub-companies, it has been held that the creditors of these sub-companies were not entitled to come against the general company, although they alleged that their furnishings went to carry on the horsing of the coach, which was part of the business of the general company, and that such furnishing was thus in *rem versum* of the general concern, by enabling the horsing to be carried on from end to end. All these pleas have been overruled, and it has been held in such cases that the sub-companies were alone indebted, being the only parties with whom the contract was made. And in the same manner, in regard to the present case, I am unable to see, since the pursuers' contract was made with Wardlaw alone, how the defender should be held liable to the pursuers. On the several grounds which I have stated, I think the direction of the lord president was right, and that the bill should be disallowed.

LORD PRESIDENT.—I remain of the same opinion which I expressed at the trial of the cause before the jury. I am satisfied, in the first place, that there was no proper case of joint-adventure; and, in the second place, that the pursuers contracted with Wardlaw alone, and trusted to him alone. There was a decision pronounced on June 5, 1806, which has not been reported, but of which I have preserved a note, which was almost identical with the present; and in that case it was held that there was no liability, such as that now alleged against the defender. The note is in the following terms:—"A merchant bought and imported a quantity of wine on his own account, but prevailed on another merchant to pay the duties, and enter into a joint-adventure for the sale of it. The [540] \*foreign merchants, the sellers, were found not to have any action for the price against the last-mentioned merchant, in respect the adventure did not commence till after the wine was the sole property of the purchaser on his own credit, 5th June, 1806, Ferreira and Co. v. Malcolm, Johnstone and Co." The principle for such a decision is plain enough. If a man goes into a watchmaker's shop and buys a watch, which he carries away, he may afterwards make a donation of that watch to a friend, if he pleases, and, although he himself may not have paid its price to the watchmaker, his donee would not be liable for the amount, merely by having accepted the gift. Wherever one individual sells goods to another individual, on the buyer's own credit alone, and for him alone, he must look to the buyer alone for payment afterwards.



The court then disallowed the bill of exceptions, and subjected the pursuers in expenses.

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The distinction between the case of *Saville v. Robertson*, and that of *Gouthwaite v. Duckworth*, is not very decided, and it is difficult to determine whether the case of *Venables v. Wood* should be regulated by the former or the latter. In so far as the court found that there was no joint-adventure between the publisher and the author, the soundness of the judgment may be questioned, as it would rather appear that where an author stipulates for a share of the profits of the sale of a work, he becomes a partner in a joint-adventure for the sale of that work. In so far, however, as the defender was found not liable, the judgment may be supported on the ground that the paper was not supplied expressly and exclusively for the publication of the work in which he had an interest. If the paper had been supplied to the publisher before the joint-adventure had been entered into, the defender would clearly not have been liable, and since it was supplied without any particular reference to or exclusive appropriation for the publication of the work in question, but for the publication of all works indiscriminately in which the publisher was engaged, the case may be thought to fall rather within the principle of the case of *Saville v. Robertson*, than within the \*principle of the case of *Gouthwaite v. Duckworth*. If, however, the [\*541] paper had been ordered by the publisher expressly for the publication of the work in which the defender had an interest, then it may be thought that the defender would have been liable, as the circumstances of the case would have then very nearly resembled those of *Gardiner v. Childs*, see *infra*, p. 546.

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WHERE GOODS ARE PURCHASED IN PURSUANCE OF A JOINT-ADVENTURE, THE PARTNERSHIP IS HELD TO BE CONTEMPORANEOUS WITH THE PURCHASES, AND ALL THE PARTNERS ARE LIABLE FOR THE PURCHASES MADE BY EACH OF THE PARTNERS.

## I.—GOUTHWAITE v. DUCKWORTH.

June 1, 1810.—E. 12 East, 421.

THIS was an action for goods sold and delivered, which was tried before Le Blanc, J., at the last assizes at Lancaster, when it appeared that the goods had been in fact supplied by the plaintiff to Browne and Company, which at that time was generally understood to mean Browne and Powell, and they alone paid for the cartage of the goods from the plaintiff's to the ship on board which they were ordered to be sent; but Browne and Powell afterwards became bankrupts, and Duckworth having been examined by the commissioners under their commission, the question arose upon his deposition whether he were not a partner with Browne and Powell in the adventure for which these goods were ordered, which were afterwards shipped and sent; and this was the only question at the trial; where, the learned judge being of opinion that the facts stated in such deposition amounted to a partnership between the defen-

dants, a verdict passed for the plaintiff. And a motion having been made, in order to take the opinion of the court upon the case, to set aside the verdict for the plaintiff and enter a verdict for the defendants,—

LE BLANC, J., now reported the facts, and read the examination of [\*542] the defendant Duckworth, taken on the 27th of April, \*1809, on which the question arose; and which stated in substance, that Duckworth had various transactions in business with Browne and Powell in 1808, and was a creditor of theirs. That in September, 1808, he entered into an agreement with Browne to be jointly concerned in an adventure to Lisbon with him and his partner Powell; of which adventure Duckworth was to have one-half share. That Browne and Powell were at that time indebted to Duckworth in nearly £2000 for advances made on the joint-account of the three in the purchase of tobacco, and which had been sent out on the joint-account to Spain before that time; and also for money lent before that time. That Browne and Powell were to purchase goods for the adventure to Lisbon, which were to be shipped on board the *Betsey*, and to pay for the same, and the returns of such adventure were to be made to Duckworth, and to go in liquidation of his demands on Browne and Powell. That in consequence of this agreement, Browne proceeded to purchase goods from different persons, and amongst others from the plaintiff Gouthwaite; but Duckworth did not go with Browne to make any of the purchases, nor did he ever authorize Browne to make the purchases on the joint-account of the three. That if any loss were to arise on the sales of the adventure, Duckworth was to bear his proportion, and was also to receive his share of the profits, if any, after reimbursing himself out of the returns the amount of his advances previously made to Browne and Powell. That Duckworth purchased and paid for goods also to be sent out at the same time, in his own name; and Browne was to receive a share of the profit, and to bear a proportion of the loss on the sales of these last-mentioned goods, which were consigned for sales and returns to Barlow, who went out as supercargo on the joint-account of Browne, Powell, and Duckworth. That Barlow's instructions were signed by Browne and Duckworth. That Duckworth afterwards received from Barlow on account of such adventure £1861, though from what particular set of goods this arose Duckworth could not tell: which sum Duckworth applied in reimbursing himself the advances he had made to Browne and Powell on account of the said adventure and otherwise. It also appeared that Duckworth had at other subsequent times received remittances and goods from Browne and [\*543] Powell, which \*he carried to account in reduction of his advances to them; and there were other distinct transactions between them relative to the purchase of goods; in one of which some coffee had been originally purchased from Sill in July, 1808, by Duckworth, on the joint-account of himself, Browne, and Powell, and he paid for them; but Browne not paying his moiety of the purchase-money at the time appointed, Duckworth, with Browne's consent, took them all on his own account, and in August following sold part of them to Browne himself, and the price was settled in account between them; and this

was done to enable Browne with the coffee to pay another tradesman for goods furnished to Browne for the adventure. All the goods mentioned in the examination were shipped on board the *Betsey* for Lisbon, which was chartered by Browne and Powell.

The rule was now opposed by *Park* and *Littledale*, and supported by *Scarlet*; and it was not denied by the latter that the facts of the case constituted a partnership in the adventure between the three defendants; but the only question made was at what period the partnership commenced; the plaintiff contending that it existed at the time when the goods were ordered; the defendant, that it originated only after the goods had been shipped into the common stock for the purpose of the adventure; likening it to the case of so much capital agreed to be brought by parties into one common stock or house, where each would be answerable separately for such part of his contribution as was raised upon his own separate credit, notwithstanding the object for which it was raised. The defendant's counsel also denied that the object of the joint-adventure being to liquidate the prior advances of Duckworth to Browne and Powell, could vary the legal effect of the joint engagement; and urged the fact of goods having been furnished by Duckworth for the same adventure, which were obtained on his separate credit. [But BAYLEY, J., observed, that it did not appear that Duckworth had brought any goods into the common stock in the transaction in question.] The case mainly relied on by the defendant's counsel was *Saville v. Robertson and Another*, 4 Term, Rep. 720, where several agreed to fit out a ship and cargo on a joint-adventure; but it was also agreed that one \*was not to be [\*544] bound for any goods ordered or shipped by another; and the plaintiff (besides supplying copper-sheathing for the vessel, which was admitted to be on the joint concern) delivered copper on board by the separate order of Pearce, one of the contracting parties; but this was held not to bind the other parties to the contract, and that the partnership only commenced upon the delivery of the cargo on board. The plaintiff's counsel, on the other hand, applied to this case what was said by Lord Chief-Justice De Grey upon the subject of partnership in *Grace v. Smith*, 2 Blac. Rep. 1000, where he states the true criterion to be, to inquire whether one agreed to share the profits of the trade with the other, or whether he only relied on those profits as a fund of payment; and here they said it was clear that Duckworth was not only to share in the profits upon the goods ordered by Browne, but the identical goods which were to constitute the adventure were to be purchased and sent for the express purpose of liquidating Duckworth's demand. And they also referred to *Waugh v. Carver*, 2 H. Blac. 235-246, where, though it was taken to be the clear sense of the parties to the agreement as between themselves, that they were not to be partners, and that each house was to carry on its trade without risk of each other, and to stand to their own loss; yet as they had agreed to share each other's profits, they were held liable as partners to third persons; and to *Hesketh v. Blanchard*, 4 East, 144, which went on the same principle.

Lord ELLENBOROUGH, C. J.—It comes to the question whether, contemporary with the purchase of the goods, there did not exist a joint-in-

terest between these defendants. The goods were to be purchased, as Duckworth states in his examination, for the adventure: that was the agreement. Then what was this adventure? Did it not commence with the purchase of these goods for the purpose agreed upon, in the loss and profits of which the defendants were to share? The case of *Saville v. Robertson* does indeed approach very near to this; but the distinction between the cases is, that there each party brought his separate parcel of goods, which were afterwards to be mixed in the common adventure [545] on board the ship, and till that admixture the partnership in the goods did not arise. But here the goods in question were purchased, in pursuance of the agreement for the adventure, of which it had been before settled that Duckworth was to have a moiety. There seems also to have been some contrivance in this case to keep out of general view the interest which Duckworth had in the goods; the other two defendants were sent into the market to purchase the goods in which he was to have a moiety; and though they were not authorized, he says, to purchase on the joint-account of the three; yet, if all agree to share in goods to be purchased, and in consequence of that agreement one of them go into the market and make the purchase, it is the same for this purpose, as if all the names had been announced to the seller, and therefore all are liable for the value of them.

GROSE, J.—I think this is a strong case of partnership within the description given of it by Lord Chief-Justice De Grey in the case cited.

LE BLANC, J.—The case is the stronger against Duckworth, inasmuch as there had been a previous partnership between him and the other two defendants upon the purchase of tobacco on their joint-account, for a similar adventure to Spain; in respect of which the latter were indebted to Duckworth for his advances upon the joint-account; and it was in order to liquidate that debt that the agreement in question was entered into for another joint-adventure to Lisbon, in pursuance of which agreement the goods in question were purchased.

BAYLEY, J.—In *Saville v. Robertson*, after the purchase of the goods made by the several adventurers, there was still a further act to be done, which was the putting them on board the ship in which they had a common concern for the joint-adventure; and until that further act was done, the goods purchased by each remained the separate property of each. But here as soon as the goods were purchased, the interest of the three attached in them at the same instant by virtue of the previous agreement.

Rule discharged.

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[546] \*II.—GARDINER v. CHILDS.

Dec. 16, 1837.—E. 8 C. & P. 345. Eng. Com. Law Reps., vol. 34.

ASSUMPSIT for goods sold and delivered. Plea, the general issue.

The plaintiffs were wholesale stationers in Newgate Street, London, and the defendants were printers at Bungay in Suffolk; and the action was brought to recover the sum of £397, 16s., being the price of certain quantities of paper, furnished by the plaintiffs on two orders, in the following forms :—

*“ Stationers’ Hall Court,  
15th February, 1836.*

“ Messrs. Bowles and Gardiner,

“ Deliver to Messrs. Childs, 200 reams super-royal, for Jeremy Taylor’s works, 100 reams in March, and 100 ditto in April.

. (Signed)

“ WESTLEY & DAVIS.”

*“ Stationers’ Hall Court,  
17th March, 1836.*

“ Messrs. Bowles and Gardiner,

“ Deliver to Messrs. Childs, 72 reams super-royal, for Doddridge’s Expositor.

(Signed)

“ WESTLEY & DAVIS.”

*Campbell, A. G.*—In opening the case for the plaintiffs, stated, that the plaintiffs supposed, at the time when the orders were executed, that the defendants were only tradesmen employed by Messrs. Westley & Davis, who were publishers in London, with whom the defendants had had dealings for some years. But Messrs. Westley & Davis became bankrupts in February, 1836, and then it was discovered that the defendants had been partners with them, in both the works for which the paper had been furnished, and the plaintiffs proved their debt under the bankruptcy, with the express reservation of the right to claim against the defendants. He contended that the moment the defendants were discovered to be partners with Westley & Davis, they became as much liable to pay as if they \*had been partners actually signing the original order for the goods. He also stated, that he should call for the [\*547] production, by the defendants, of certain agreements between them and Westley & Davis, under which they became partners in the Family Expositor, and the works of Jeremy Taylor; and if they were produced, and were not stamped, he should prove a refusal on the part of the defendants, to permit them to be stamped, and see whether the defendants were to be allowed to take advantage of such a mere technical objection. But even if the agreement should not be given in evidence, there would, he trusted, be sufficient proof in the accounts between the parties, which had been discovered among the papers of Messrs. Westley & Davis.

A clerk of the plaintiffs was called to prove the handwriting of the firm of Westley & Davis, to the orders for the goods; he admitted, on his cross-examination, that the plaintiffs had dealings with Westley & Davis to a very large amount; that it was often the case that publishers bore the expenses of a work, and settled with others who had an interest in it, and that he never knew of the plaintiffs applying to any other person than the publishers in any case.

*Campbell, A. G.*, then called for the production of two agreements,

one dated the 8th of October, 1831, between the defendants, a Mr. Hall, and Messrs. Westley & Davis, and the other dated the 8th of February, 1834, between the defendants and Westley & Davis only, under which, as the plaintiffs alleged, the defendants became partners in Doddridge's Expositor, and Jeremy Taylor's works.

They were handed to the officer by the counsel for the defendants, and on inspection it appeared that they were not stamped.

Upon this, an objection to their being read was taken by Crowder, for the defendants.

*Campbell, A. G.*—I can show that application was made to a judge, [548] who refused to order the production of the agreements, \*on the ground that the plaintiffs were not parties to them. It would be allowing a party to take advantage of his own wrong, if the defendants were at liberty to object to the want of a stamp when they would not produce them, and thereby prevented them from being stamped. The question is, Whether there is not an implied exception to the general rule, if a party has done all he can to get an instrument stamped?

*Lord DENMAN, C. J.*—I think there is not. It cannot have the effect of repealing the Stamp Acts.

The following accounts were then put in :—

| 1836. Dr.   |      |    | Taylor's Works with J. R. and C. Childs. |                      |       | Cr. |    |          |
|---|------|----|--|----------------------|-------|-----|----|----------|
|   | £    | s. | d.                                       |                      | £     | s.  | d. |          |
| June 30, Carriage,                                    | 1    | 6  | 4  | June 30, 62-50       | } 100 | 0   | 0  |          |
| Commis. 10 per ct.                                    | 10   | 0  | 0  | Appleton. 40s.,      |       |     |    |          |
| Net,  | 88   | 13 | 8  |                      |       |     |    |          |
|   | £100 | 0  | 0  |                      |       |     |    |          |
| Messrs. Westley & Davis $\frac{1}{2}$ net,            |      |    |  |                      |       |     |    | £44 6 10 |
| Doddridge's Expositor.                                |      |    |  | <i>Bungay, 1836.</i> |       |     |    |          |
| <i>Dr.</i> To J. R. and C. Childs.                    |      |    |  |                      | £     | s.  | d. |          |
| Oct. 19, Printing 500—67 reams at 14s.,               |      |    |  |                      | 46    | 18  | 0  |          |
| Paper and printing 500 plates,                        |      |    |  |                      | 3     | 15  | 0  |          |
|   |      |    |  |                      | £50   | 13  | 0  |          |
| Messrs. Westley & Davis, <i>Dr.</i>                   |      |    |  |                      |       |     |    |          |
| One third of the above,                               |      |    |  |                      | 16    | 17  | 8  |          |
| Messrs. Westley & Davis.                              |      |    |  | <i>Bungay, 1837.</i> |       |     |    |          |
| Present Bill, To J. R. and C. Childs.                 |      |    |  |                      | £     | s.  | d. |          |
| 6 months.   |      |    |  |                      |       |     |    |          |
| January 1, $\frac{1}{2}$ printing 500 Taylor, Oct. 5, |      |    |  |                      | 67    | 0   | 6  |          |
| $\frac{1}{2}$ do. 500 Expositor, Oct. 19,             |      |    |  |                      | 16    | 17  | 8  |          |
| February 4, Settled, in account,                      |      |    |  |                      | £83   | 18  | 2  |          |

J. R. & C. CHILDS.

\*An account-current between Westley & Davis and the defendants was also put in, in which it appeared that a mistake had [\*549] been made as to the Expositor, in consequence of which the following letter had been written to Messrs. Westley & Davis:—

*“Bungay, 7th February, 1837.*

“Dear Sir,—I see that in the haste with which your accounts were thrown together one material error occurred. It is this:—We stand charged with the whole instead of one-third of the paper for Doddridge’s Expositor, that is, we are debited £93, 12s. in place of £31, 4s. I therefore now debit you £31, 4s., and shall also charge Mr. Hall £31, 4s., which will square the account; you remembering that you will make no charge against Mr. Hall for the item.”

This letter was signed “Charles Childs,” and was addressed to “Mr. A. K. Davis.”

*Crowder* for the defendants.—The course of business is, that the publisher orders the paper to be sent direct to the printer, instead of to his own premises, but it is furnished on his credit. The plaintiffs have furnished the goods on the credit of Westley & Davis, with whom they have done business for many years in the same way, and now, because Westley & Davis have failed, they turn round upon the defendants, which, I submit, in point of law they are not at liberty to do, upon the evidence given in this case. The documents put in evidence only establish an interest in the two works, from June, 1836, and January, 1837; but I deny, on the documents put in, that any such interest as would establish a partnership existed at the date of the orders, viz., 16th of February, 1836, and 16th of March, 1836. I admit, that if secret partners existed at the time of furnishing the goods, they may be sued if discovered afterwards. The printer is to be paid, and he sends his account to the publisher, and my friends on the other side infer, from the words “Net £44, 6s. 10d.,” that there was a partnership. But assuming that there was to be an interest when the work was complete, would that constitute a partnership so as to make the \*defen- [\*550] dants liable for the paper to be used in completing it? In the case of *Saville v. Robertson*, 4 T. R. 720, where the parties were to become jointly interested in a cargo of goods, one party, in order to complete it, had ordered goods, and he who had ordered them became bankrupt; the seller sued all the parties to the adventure, and failed, as the partnership was not complete till the cargo was complete. If the law be that the plaintiffs have a right of action against the defendants, then the man who supplied the printer’s ink to the defendants, and the journeymen who worked the press, might sue Westley & Davis. In *Young v. Hunter*, 4 Taunt. 583, Gibbs, J., said, “I am by no means of opinion that there may not be a case where two houses shall be interested in goods from the beginning of the purchase, yet not be both liable to the vendor; as, if the parties agree among themselves that one house shall purchase the goods, and let the other into an interest with them, that other being unknown to the vendor, in such a case the vendor could not recover against him, although such other person would have the benefit

of the goods." In the present case, the defendants were unknown to the plaintiffs as having any interest at the time of the purchase, and a dormant partner is only liable on the ground of an implied agency of one partner for the other in the partnership concerns. That implication does not arise in the case of a single adventure, but is confined to the case of a general partnership. Be it that it is a joint publication, different persons order the different things required, one the ink, and another the paper, and each is to be answerable for the particular goods which are furnished upon his particular credit. In the cases of coach proprietors, where each have particular portions of the road, and horse them, and find hay and corn, an action cannot be supported against the proprietors generally for corn, &c., furnished to the particular person who ordered it. In *Barton v. Hanson and Others*, 2 Taunt. 49, it was decided, that if several persons horse, with horses which are their several property, the several stages of a coach in the general profits of which they are partners, they are not all jointly liable for goods furnished to one partner for the use of the horses drawing the coach along his part of the road. The course and practice of publishers with printers is admitted \*by my learned friend to be universal, and one of the [\*551] witnesses also admits it to be so,—that many persons are interested besides the publisher, but the publisher employs the tradesmen. The question is, Whether there was a partnership in the paper, and not in the publication merely?

Lord DENMAN, C. J., in summing up, (after stating the evidence of the supply of the paper, &c.) said,—In order to show the partnership, the plaintiffs put in settlements of accounts between Westley & Davis, and the defendants, some of them early and some of them late, some as early as June, 1836, the paper being ordered to be supplied in April and May, 1836, and in June, 1836, they claim one-half of the net in the work of *Jeremy Taylor*, which is one of the works for which the paper was supplied; so that it is made perfectly clear that the Messrs. Childs had an interest in the particular works in respect of which the paper was furnished. Observations have been made as to the hardship of the case. It is better not to look at the hardship of the case at all, but to look to the rule of law upon the subject. In my opinion the rule of law is this,—if these defendants were partners in the publications at the time when the orders were given, they are liable for the things furnished to complete that publication, although Messrs. Westley & Davis were liable in the first instance. I can conceive that all the partners may not be liable for all that is done by each individual partner, as in the case suggested by Mr. Justice Gibbs, but I think that in such cases there should be something exclusive in the nature of the transaction,—not only that they should not be known, but that the ordering of the goods should be the exclusive act of the particular partner. The question is, Whether these accounts convince you that the partnership existed at the time when the goods were furnished; if they do, then the defendants will be liable. The plaintiffs having made out a strong *prima facie* case, it is difficult to avoid looking at the conduct of the defendants with respect to the agreements which have been alluded to. The defendants being



called on to pay as partners might show when they began to be such by the production of the agreements, but they refused to produce them before the learned judge. You will say whether you \*think that at the time when these goods were furnished, the defendants [\*552] were partners in the concern for whose benefit they were furnished. If you think they were, then you will find for the plaintiffs; if you think the plaintiffs have not made this out to your satisfaction, then you will find your verdict for the defendants.

Verdict for the plaintiffs.—Damages, £397, 16s.

In the ensuing term a new trial was moved for on the part of the defendants, but the Court of Queen's Bench refused to grant a rule.

WHERE A PARTY DISCOUNTS A BILL DRAWN BY ONE OF SEVERAL PARTNERS IN HIS OWN NAME, NO ACTION LIES AGAINST THE PARTNERSHIP EITHER UPON THE BILL SO DRAWN, OR FOR MONEY HAD AND RECEIVED THROUGH THE MEDIUM OF THE BILL, EVEN ALTHOUGH THE PROCEEDS WERE CARRIED TO THE PARTNERSHIP ACCOUNT.

### EMLY v. LYE.

Jan. 24, 1812.—E. 15 East, 6.

THIS was an action of assumpsit brought under an order of the lord chancellor by the plaintiffs, as assignees of the bankrupt, who was the holder of several bills of exchange at the time of his bankruptcy. The declaration, which contained different counts upon the bills, stated that before the time of the bankruptcy, the defendants George Lye and E. L. Lye being partners trading under the firm of George Lye and Son, E. L. Lye drew a certain bill of exchange on W. Williams, on account and for the use of the said partnership, and by the authority of G. Lye, payable to H. Horne, or order, two months after date, for £50, value received; and then stated an indorsement by Horne to Burrough before the bankruptcy, the presentment, and non-payment of the bill, in the usual way. There were similar counts on the rest of the bills, and also counts for money \*lent, for money paid to the defendants before the bankruptcy, for money had and received, and upon an ac- [\*553] count stated. The defendants pleaded the general issue.

At the trial before Lord Ellenborough, C. J., at Westminster, it was proved that the bills in question were all drawn in the name of E. L. Lye only. That the defendants were carriers, residing at Warminster, and employed Horne as their book-keeper at Salisbury, where Burrough carried on the business of a banker. That Horne was in the habit of receiving bills from his employer, some drawn in the name of the firm, some by G. Lye only, and the bills in question by E. L. Lye. Horne carried these bills to Burrough, who was not acquainted with the defendants, but had received strong recommendations of them, and they were

discounted by Burrough at various times; he making no distinction between the bills, but conceiving that they were all drawn on the partnership account. The proceeds of the bills were remitted and paid by Horne to the partnership account, and the discount thereof allowed to him in his account with the partnership. Upon these facts a verdict was found for the plaintiffs for £4619, 10s., with liberty to the defendants to move to set it aside, and enter a nonsuit. A rule for that purpose having been obtained by Burrough in the last term,

*Garrow, Marryat, and A. Moore*, now showed cause, and relied on the money counts, contending that the transactions relative to the bills in question constituted a debt due to the bankrupt from the defendants. Horne was their agent; and it was the same thing as if the defendants had represented him as such to the bankrupt, and required the bankrupt to make advances on their account, taking a ticket or memorandum of the sums advanced. Such a transaction would have been money lent by the bankrupt to the firm. But the bankrupt instead of taking such memorandum, received bills drawn by one of the firm only. That perhaps may narrow his right upon the bills to recover against that one partner only, but will not alter his claim upon the partnership to make good the sums advanced by him on their account, and applied to their use. The bills were given by the one partner only as a collateral security \*for the debt of both, which was not thereby [554] merged; as was determined in *Wilson v. Kennedy*, 1 Esp. N. P. Cas. 245, where the debtor himself gave a promissory note for his debt; and the same doctrine was held in *Puckford v. Maxwell*, 6 Term, Rep. 52. In *Siffkin v. Walker and Another*, 2 Camp. N. P. Cas. 308, the action was brought only upon the note; but here there are other counts which will sustain the demand, on the ground of the money having been received for and applied to the partnership use.

The *Attorney-General, Burrough, Dampier, and Casberd*, contra.—If this were a debt due from the partners to the bankrupt, for which the bills were given as a collateral security, the argument for the plaintiffs might avail; but here the bankrupt had no previous account with the partners, and the only transaction between them, to constitute a debt, was the discount of these bills; the remedy, therefore, must be sought for under the bills only. But it is admitted that, according to the case of *Siffkin v. Walker*, the plaintiffs cannot charge the two defendants upon the bills, which are only drawn by one of them in his own name. A party who discounts a bill must be content with the responsibility of the persons whose names are on the bill, and cannot resort to others whose names do not appear on it, however they may be benefited by such discount; and the conception of the person who discounts the bill cannot extend his rights. Here, too, the discounter might have known the distinction between the joint and several bills of the partners, having discounted bills of both descriptions. A party may choose to discount rather than lend money on bills, for the sake of entitling himself to receive the interest in advance; and the present receipt of it shows that the money was advanced on discount, and not on a deposit of bills. Then as to the proceeds of the bills having been applied to the use of the partnership;

that alone has never been held sufficient to charge the receiving parties with the loan of the money so applied; for that would be to make a stranger to the bill liable, who gets it discounted in the market, without putting his name to it; the contrary of which has been determined in *Fenn v. Harrison and Another*, 3 Term, Rep. 757, and 4 Term, Rep. 177, S. C. In that case \*there was not only an appropriation of the money discounted to the use of the defendants, but an express [\*555] promise by them afterwards to take up the bill; and yet the action was held not to lie. The same principle is recognised in *The Bank of England v. Newman*, 1 *Ld. Raym.* 442, *Com.* 57, S. C.; *Fyddell v. Clarke*, 1 *Esp. Rep.* 447; and in a case *Ex parte Shuttleworth*, 3 *Ves. jun.* 368. The cases of *Pinkney v. Hall*, 1 *Salk.* 126; and *Carvick v. Vickery*, *Dougl.* 653, were also mentioned on the rule to show cause.

**LORD ELLENBOROUGH, C. J.**—The first counts of this declaration have been properly enough abandoned; for unquestionably on a bill of exchange drawn by one only, it cannot be allowed to supply by intentment the names of others in order to charge them. If the plaintiffs, therefore, would rest their claim upon the bills, they must confine it to *E. L. Lye*. The bills, considering the transaction as a discount between the parties, are his only. But it is contended that as the proceeds went to the use of the partnership, the partners are therefore liable upon the other counts. I am at a loss to discover what difference that circumstance can make, if it were originally a mere matter of discount; and I do not find any evidence to show that it was anything else. It was supposed, indeed, by *Burrough*, (the bankrupt,) that the money would be applied to the partnership use; and to such use it was in fact applied; but nothing passed from the defendants to induce him to believe that it was a partnership concern, and to lend his money on that account. It does not appear that any contract of that sort took place, nor anything more than the mere discount of the bills; and it would be highly dangerous to follow the proceeds into the hands of every party to whose use they may be applied. If the bills had been void,—as if, for instance, they had been forgeries,—that might have made a different case, because then no consideration would have passed to the person discounting; but here a good consideration was given for the discount, namely, the responsibility of the drawer of the bills. In the absence, therefore, of any express contract between the parties, it appears to me that we must treat the transaction as a mere discount of the bills.

**\*GROSE, J.**—It is contended that this was money lent to the partnership; but it was only mere matter of discount, and not [\*556] money advanced on the general security of the partnership, although it was applied to their use. At the time when the discount took place, the partnership had made no contract with the discount, who therefore must be taken to have purchased the bills of one of the partners only. If the partners were not liable at the time when the discount was made, the subsequent application of the money cannot make them liable.

**LE BLANC, J.**—On the securities themselves I think this action cannot be maintained; for to charge the defendants on these bills, they must appear to have been drawn for and on account of the partnership.

The question, then, upon the other counts is, Whether this was a loan to the persons to whose use the money was applied, or only a discount of the bills? It appears to me on the evidence, notwithstanding the apprehension of the banker or the clerk, or the subsequent application of the money, to be merely a transaction of discount, and not an advance of money, taking the bills as a collateral security. But where another security is not required, the party who discounts a bill of exchange stands in the situation of a purchaser of the bill; and therefore, according to the case of the *Bank of England v. Newman*, cannot recover against the person with whom he discounts it, and whose name is not on the bill, the money advanced by way of discount.

BAYLEY, J.—I cannot treat this as a case of money lent to the defendants. Burrough never considered himself as lending money to them; if he had, he would have made an entry in his books charging them as his debtors. There was no contract made between the parties at the time, nor any previous subsisting debt between them. I think, therefore, that the discounter has made a purchase of the bill. If a person buy goods of another, who agrees to receive a certain bill in payment, the buyer's name not being on it, and that bill be afterwards dishonoured, the person who took it cannot recover the price of his goods from the buyer; for the bill is considered as a satisfaction. It has been so held; [\*557] and I \*can see no difference where money instead of goods is given for the bill.

Rule absolute.

IN ENGLAND ONE PARTNER OF A FIRM CANNOT BIND THE OTHER PARTNERS BY A DEED UNDER SEAL, ALTHOUGH GRANTED IN THE COURSE OF THE BUSINESS OF THE PARTNERSHIP.

### HARRISON v. JACKSON.

May 12, 1797.—E. 7 T. R. 207.

THIS was an action of covenant upon an agreement of three parts stated in the declaration to have been made on the 10th of July, 1794, between the defendants, describing them as merchants and partners of the first part, W. and J. Harrison of the second part, and the plaintiff of the third part, of one part of which said agreement, as being sealed with the seal of the said W. Sykes for himself and the other two defendants, the plaintiff made a profert in court. The declaration then stated the agreement and covenant of the defendants, the subject-matter of which agreement and covenant appeared on the agreement to be a partnership transaction on the part of the defendants, and to have been entered into on a full and valuable consideration received by them as partners. The declaration then stated the breach of covenant, whereby the plaintiff had sustained damage to the amount found by the jury.

To this declaration the defendants pleaded that the agreement was not the deed of the defendants. Issue being joined, the cause was tried at the sittings after Hilary Term, 1797, before Lord Kenyon, at Guildhall, when the jury found a verdict for the plaintiff, damages £477, 13s. 6d., and costs 40s., subject to the opinion of this court on the following case :—

The defendants were partners. The agreement stated in the declaration was produced ; and the subscribing witness proved that it was executed in his presence by the defendant \*Sykes in the following [\*558] form :—" For Jackson, Self, and Rushforth ; W. Sykes." But neither Jackson nor Rushforth was present at the execution. The question for the opinion of the court was, Whether such execution of the agreement by the defendant Sykes was binding on the other defendants, Jackson and Rushforth ?

*Dampier* for the plaintiff.—As the deed was executed by one partner in a partnership transaction for a full and valuable consideration received by all the partners, it is binding on them although they were not all present. "One piece of wax may serve for all the grantors if every one put his seal on the same piece of wax, or another do so for them." Perk. § 134. In *Mears v. Serocold*, the defendant pleaded *non est factum* to an action brought on a joint and several bond ; at the trial it appeared that Jackson was in partnership with Serocold when the bond was given, and that the consideration of the bond was a partnership debt due from Jackson and Serocold to the plaintiff, and that Jackson first executed the bond for Serocold, and then for himself. Lord Mansfield ruled that for a partnership debt one partner had authority to execute a bond for another, and thereupon directed a verdict for the plaintiff. Now, that is a stronger case than the present, because there the action was brought against the partner who did not execute the bond, and not against him who did, the bond being several as well as joint. In the case of simple contract debts, it will be admitted that one partner may bind the rest by his own acts. In the instance of drawing and accepting bills it is in everyday's practice. So, if an action be brought against several persons, one may enter an appearance for the rest, which may in its consequences lead to a judgment against all. Then in point of reason there is no objection to one partner binding the others by a deed in a partnership concern, where the consideration-money is applied to the benefit of all the partners. And in some instances it would be highly inconvenient if one partner had not that power ; as where the partners are at a distance from each other, and a creditor pressed one of them for a security for his debt, if that one had the power of binding the other by a deed, it might prevent the partnership effects being seized in \*execution by a creditor who would not be satisfied with a less security [\*559] than a deed. And though in *Ball v. Dunsterville* and *Another*, where one partner executed a deed for himself and his partner in the presence of the other, the court laid stress on the last circumstance, it may be observed that that was only a partnership in that single transaction, whereas here the defendants were general partners. But however limited in this respect may be the power of partners not constituted such by deed, if this

were a partnership constituted by deed, that gave authority to all the partners to bind one another by deed.

*Giles* for the defendants.—It not appearing in this case that Sykes, who executed the deed for himself and his partners, had any authority from the others to bind them by deed, it must be taken that he had no such authority; the execution, therefore, as far as it affects them, must rest wholly on the general power, which is incident to the relation of partners. But the law recognizes no such general power, by which one partner may bind the rest by deed. In this respect the instance of one partner acting for the others is analogous to the case of an agent acting for his principal, who cannot bind his principal by deed without being authorized by deed so to do. Com. Dig. "Attorney," (C. 1,) and (C. 5.) Neither can an attorney, who is only authorized by parol, make a feoffment and livery, 2 Rol. Abr. 8, R. pl. 4; or a lease of years; 3 Bac. Abr. 408. In the case of *Horsley v. Rush and Tolson*, which was an action of covenant on a charter-party, to which the defendants pleaded the general issue, it appearing that the deed was executed by "G. Dwyer, by order and for account of Messrs. Rush and Tolson," but that Dwyer had only a verbal authority from the defendants to execute the charter-party, Lord Kenyon held that the action could not be maintained; for that a deed could not be executed by an agent so as to bind the principal, unless he were authorized by deed under seal, and that though one partner might bind another by written instruments, he could not do so by deed without a special power under seal for that purpose. This is distinguishable from the case of *Mears v. Serocold*; for there perhaps [\*560] one partner was authorized to execute the deed for the rest; and \*in the case of *Ball v. Dunsterville*, the execution by one was in the presence of the other, on which circumstance the court principally relied. And independently of authorities, it would be attended with mischievous consequences if one partner could bind the others by deed, for that would affect not only the partnership effects, but it would also bind the lands of the other partners, even in the hands of their heirs.

*Dampier*, in reply.—This is not like the case of an agent acting for his principal, for he cannot bind the principal beyond the scope of the particular power given to him; but the power that each partner has, arises out of the interest that he has in the partnership concerns, and from the dominion that he has over the partnership effects. And in answer to the argument that if one partner may bind another by deed he may affect the lands of that other even in the hands of the heir, it may be remarked that the same consequence may follow from permitting one partner to enter an appearance to an action for the others, since the judgment to be signed in such action will equally bind the lands of the other partners.

Lord KENYON, C. J.—I should be sorry to have it supposed that this case was reserved from the least particle of doubt that I had on the subject: the parties came to Nisi Prius with the facts admitted on both sides; for if the case had been opened there, I should certainly have given a decisive opinion against the plaintiff. The law of merchants is

part of the law of the land; and in mercantile transactions, in drawing and accepting bills of exchange, it never was doubted but that one partner might bind the rest. But the power of binding each other by deed is now for the first time insisted on, except in the *Nisi Prius* case cited, the facts of which are not sufficiently disclosed to enable me to judge of its propriety. Then it was said that if this partnership were constituted by writing under seal, that gave authority to each to bind the others by deed; but I deny that consequence just as positively as the former; for a general partnership agreement, though under seal, does not authorize the partners to execute deeds for each other, unless a particular power be given for that purpose. This would be a most \*alarming doctrine [\*561] to hold out to the mercantile world; if one partner could bind the others by such a deed as the present, it would extend to the case of mortgages, and would enable a partner to give to a favourite creditor a real lien on the estates of the other partners.

PER CURIAM.—Postea to the defendants.

ALTHOUGH IN THE CASE OF AN ORDINARY TRADING PARTNERSHIP EACH PARTNER MAY BIND THE REST BY DRAWING AND ACCEPTING BILLS, THE MANAGING PARTNERS OF A JOINT STOCK COMPANY HAVE NOT THAT POWER UNLESS IT IS CONFERRED UPON THEM BY THE DEED OF COPARTNERY.

### DICKINSON v. WALPY.

Nov. 25, 1829.—E. 10 B. & C. 128. Eng. Com. Law Reps., vol. 21.

THIS was an action by the plaintiff as indorsee of the following instrument:—

*“Redruth, March 30, 1826.*

*“£300, 0s. 0d.*

*“Two months after date, pay to the order of Mr. Thomas Teague, three hundred pounds, value received as advised.*

*“For the Cornwall and Devonshire Mining Company,*

*“ROWLAND WILKS.*

*“To the Cornwall and Devonshire Mining Company, Lombard Street, London.”*

The first four counts of the declaration described the instrument as a bill of exchange, charging the defendant as drawer and acceptor; and the fifth described it as a promissory note. Plea, general issue. At the trial before Burrough, J., at the summer assizes for the county of Somerset, 1827, the following \*appeared to be the facts of the case:— [\*562] The bill was indorsed for value by one Teague to the plaintiff; and having been dishonoured when due, the plaintiff now claimed to recover the amount from the defendant as a member of the Cornwall and Devonshire Mining Company. In order to show that he was a partner

in that company, the plaintiff proved that in the early part of the year 1825, certain persons associated themselves together for the forming of a company, for the purpose of working mines in Devonshire and Cornwall. On the 7th of April in that year a meeting of those persons was held, at which resolutions were passed that there should be a company formed, with a capital of one million, in shares of £50 each; that mines in Cornwall should be purchased, and that there should be directors, a treasurer, a secretary, and other officers, and bankers to the company. These resolutions were advertised in the newspapers. A counting-house was taken in London for transacting the business of the company, clerks were engaged, a contract was entered into for the purchase of mines in Cornwall, an agent was employed to reside there, and some of the mines were actually worked. The defendant, on the 6th day of April, applied to the secretary of the company for thirty shares, and ten were appropriated to him. Upon these shares he paid to the bankers of the company an instalment of £5 per share, and received in return certain printed receipts, called scrip receipts. He afterwards took these scrip receipts to the counting-house, where there was a meeting of the directors, and paid a second instalment of £10 per share, and signed a deed. In July, 1826, he attended a general meeting of the shareholders. The defendant offered evidence of what he said at that meeting, to show that he went to it for the purpose of declining any interest in the company, and not for the purpose of taking any part in the direction of its affairs. The learned judge rejected this evidence. The defendant then tendered evidence to show that the original projectors of the company had, by false representations, induced him and other persons to become members of it. The learned judge was of opinion that fraud in the concoction of the concern, though practised on the defendant, was no answer to this action by a mere stranger, and refused to receive the evidence. It appeared further that \*the bill was drawn and accepted in London, though [563] dated at Redruth, in pursuance of a resolution of the directors, which was entered in the book of the company, and in discharge of a claim by Teague on the company for an advance made by him, and was afterwards allowed in account to Wilks the drawer. It was objected, first, that there was no evidence to show that the defendant ever actually became a partner in interest, or held himself out to the world as a partner. The learned judge was of opinion that there was sufficient proof to make the defendant liable as a partner. Secondly, assuming that the defendant was proved to be a partner, there was no proof that the directors had authority to bind the shareholders by drawing or accepting bills. The learned judge reserved the latter point, and a verdict was found for the plaintiff for the amount of the bill. In the following term, a rule nisi was obtained for entering a nonsuit upon the point reserved by the learned judge, or for a new trial, on the ground that the evidence tendered by the defendant had been improperly rejected, and that there was no evidence to show that the defendant was a partner.

*C. F. Williams and Follett* now showed cause.—There was ample evidence to show that the defendant either was an actual partner, or that he held himself out to the world as a partner in the company. First, it was



proved that a partnership or company was formed for the purpose of working mines, selling the ore, and sharing the profits; that the company had a counting-house, agents, clerks, and all the usual accompaniments of a mercantile speculation. Secondly, there was proof that the defendant was a partner in that concern. He applied for shares and they were allotted to him, he paid money towards the funds of the society, he attended at the counting-house, and also at a general meeting of shareholders, as a member of the company, and he signed some deed. The plaintiff, a perfect stranger to the company, and the mere holder of a bill of exchange, cannot reasonably be expected to produce the deed of co-partnership between the defendant and the other members of the company. Besides, parol evidence is sufficient to show that a person is an actual partner with another, although there \*may be a deed of partnership, *Alderson v. Clay*, 1 Starkie, 405, *Holmes v. Higgins*, 1 [\*564] B. & C. 74. But then it will be said that, a mine being real property, an actual conveyance ought to have been proved, in order to show that the defendant took any interest in it; and *Vice v. Lady Anson*, 7 B. & C. 409, will be relied on. In that case there was no proof that Lady Anson had attended any meeting of the shareholders, or that she had any interest whatever. But it is not essential, in order to constitute mining adventurers partners, that they should have an interest in the mine itself. It is sufficient for that purpose that they have a right *inter se* to share the profits of the mine. It is not usual in actions against mining companies to give any proof of an actual interest in the mine, for no interest in the mine is ordinarily given to the adventurers; they have a mere license to work the mine. [BAYLEY, J.—Will that license pass otherwise than by deed?] The usual evidence is that the defendant attended at the meeting of the proprietors, or had his name inserted in what is called the cost-book of the mine. [BAYLEY, J.—That would be evidence to show that he was entitled to share in the profits.] Here the defendant became an actual partner in interest by the assent given to his application for shares by the other members of the company, to whose secretary he applied, and by the payment of his deposits. He also held himself out to the world as a partner by reason of his having paid his deposits, and having attended at the counting-house and the meeting of the shareholders. In *Perring v. Hone*, 4 Bing. 28, the plaintiff's name was entered in a book with those of several other subscribers to a projected joint stock company. The plaintiff received certain scrip receipts, but sold them before the deed for the formation of the company was executed, and therefore he was not a party to that deed. It was held that he was a partner in the concern. In *Ellis v. Schmœck and Thomas*, 5 Bing. 521, the defendants had purchased the scrip of a mining company which originated in fraud, and had attended one meeting of the company; but they never signed the partnership deed, were innocent of the fraud, and transferred their scrip before the plaintiff commenced an action for goods furnished to the company after the defendants had purchased their scrip. It was held \*they were liable. But then, assuming that there was a partnership in this case, it will be said it was not a trading partnership, [\*565]

but a partnership in real property, and that particular members of it have no implied authority to bind the others by drawing and accepting bills of exchange; that, like the joint tenants of a farm, they are not traders subject to the bankrupt laws. But here the persons who composed this company did not join together for the purpose of cultivating a real estate. They did not raise the ore of the mine for the purpose of enjoying the real estate, but as a mode of carrying on a trade. They manufacture and prepare the ore for the market. *Port v. Turton*, 2 Wils. 169, may be cited to show that a person who buys a coal mine, works it, and sells the coals, is not necessarily a trader within the bankrupt laws. But if the business is carried on not as a mode of enjoying the profits of a real estate,—if it is carried on substantially and independently as a trade, then the party carrying it on will be subject to the bankrupt laws, *Heane v. Rogers*, 9 B. and C. 577. It is not necessary, however, to contend here, that these persons would be traders liable to the bankrupt laws. It is sufficient to show that they constitute a trading partnership. In *Crawshay v. Maule and Others*, 1 Swanst. 495, it was held that where several persons are jointly interested in a mine which they are working, the concern is not a joint interest in land, but a partnership in trade; and in *Jefferys v. Smith*, 1 Jac. and Walk. 298, a receiver was appointed of mines, in which several persons were interested, on the ground that the concern, from the nature of the subject, was a species of trade, and not a mere tenancy in common of land. And in *Story v. Lord Windsor*, 2 Atk. 630, Lord Hardwicke said, that a colliery was a kind of trade, and that an account might be taken of the profits; and *Jesus College v. Bloom*, 3 Atk. 262, *Ambler*, 54, shows that an adventurer in mines may have an account of profits in equity like other trading partners. The principle on which partners have been held to have power to bind one another, by drawing or accepting bills of exchange, is, that one partner is presumed to be the agent of the others for doing all such acts as are necessary to carry into effect the purposes for which they are associated together. If they sell goods, therefore, to persons living at a distance, they must in the ordinary course draw bills for payment. So also, if they buy upon credit, they must accept bills. Now, the persons trading in this ore must buy materials to enable them to raise it, and must sell it to persons living at a distance. The same necessity, therefore, exists for them to draw and accept bills as for the members of any other trading partnership. Then, as to the rejection of the evidence, what the defendant said or did at the meeting of shareholders in July, could not be evidence to show that he was not a partner in March, when the bill was drawn. [PARKE, J.—If you relied on the fact of his having attended that meeting to show that he was a partner, what he said or did at that meeting must be evidence to show the character in which he attended.] Assuming that to be so, evidence was not admissible to show that the original proprietors of the company induced the defendant and others to become members, by fraudulently misrepresenting their capital, and falsely promulgating that certain persons had become shareholders, unless it was shown that the plaintiff was a party

to the fraud. The only question is, Whether the defendant was a partner in that company? If he was, he is liable.

The *Attorney-General*, (and *Crowder* was with him,) in support of the rule, was desired by the court to confine himself to the question, Whether the directors had authority to bind the other members of the company by drawing and accepting bills? It is clear that the directors could not bind the other members of the company by drawing and accepting bills, without any authority from them, either express or implied. Here there was no proof of any express authority. The deed of copartnership was not produced. The law will not imply such an authority in this case, though it does so in the case of an ordinary trading partnership. Here several persons have associated together for the purpose of working mines, and raising and selling the ore. That is not a trade, but a mode of enjoying the produce of the land. The adventurers resemble the joint occupiers of a farm, whose object is, by cultivation, to raise the produce and sell the same; and though it may be necessary to purchase many things for the purpose of cultivating \*the land and effecting their object, [\*567] the law does not imply any authority for one of several persons jointly interested in a farm, to bind the others by bills of exchange, *Greenslade v. Dower*, 7 B. and C. 635. Ship-owners may bind each other for repairs, but not by bills of exchange, *Williams v. Thomas*, 6 Esp. 18.

Lord TENTERDEN, C. J.—Assuming that the defendant was proved to be a partner, and not merely to have done certain acts in contemplation of becoming a partner, it was not shown that he, or the other members of that company, had given any authority to a certain part of that company to bind the rest, by drawing or accepting bills of exchange. In order to show that, the plaintiff should have gone further, and proved some express authority for that purpose, or facts from which the law would imply such authority. The deed executed by the defendant and the other partners may, perhaps, have contained a clause empowering the directors to draw and accept bills; but that was not produced. In the absence of such proof, I am of opinion that the mere circumstance of the defendant's having become a shareholder in a mining company does not, in point of law, make him answerable for bills drawn or accepted by those who took upon themselves to manage the concern.

BAYLEY, J.—I am not prepared to say that there was sufficient evidence to charge the defendant either as an actual partner, or as a person who held himself out to the world as a partner. A doubt upon that point, however, would only entitle the defendant to a new trial. But in order to establish his liability, it ought to have been made out affirmatively, on the part of the plaintiff, that this was a company in which the directors were authorized to bind the other members by drawing and accepting bills. Now, upon that point, the only question which could be submitted to the jury was, Whether companies instituted for similar purposes had constantly been in the habit of drawing and accepting bills? or whether it was absolutely necessary, for the purpose of carrying on the concern, that there should have been such a power? There was no evidence to warrant the judge in leaving those questions to the \*jury. First, there was no evidence for them that such a [\*568]

power was usually vested in the directors of other companies, or that it was necessary for the purpose of carrying on such a concern. I think that such a power is not necessary for that purpose. The directors of such a company ought to take care to have ready money to answer all demands upon them. If they have not, I cannot suppose that every person who becomes a shareholder in such a company understands that he is to be personally liable upon a bill of exchange, drawn or accepted by a director; for the effect of that would be to authorize the directors to pledge the credit and responsibility of the individual shareholders to any extent; and if that was not the understanding of the shareholders, the directors could not have any implied authority to pledge the credit of the other members by drawing or accepting bills. The directors may bind themselves personally, and pledge their own responsibility, but not that of the other members. I am therefore of opinion, that there was in this case no evidence of any authority conferred upon the directors by the defendant, or any other members of the company, to charge them individually, by drawing or accepting bills of exchange.

LITTLEDALE, J.—I think the rule must be made absolute for a non-suit. The bill is drawn by Richard Wilks for the Cornwall and Devonshire Mining Company. It is addressed to the company, and accepted for them by John Wood, their secretary. In its form, therefore, it is very unusual. It is not a bill drawn by individuals upon others, but drawn for and accepted by a mining company. When the plaintiff, therefore, took this bill, he had notice on the face of it that it was not an ordinary bill of exchange. It was then incumbent on him to inquire whether the persons who drew and accepted this bill had authority by such acts to bind the defendant, the latter not appearing on the face of the bill to be a partner with those persons; and it was incumbent on the plaintiff to prove at the trial that they had such authority. In the case of an ordinary trading partnership, the law implies that one partner has authority to bind another by drawing and accepting bills, because the [\*569] drawing and accepting of bills is necessary for the \*purposes of carrying on a trading partnership; but it does not follow that it is necessary for the purpose of carrying on the business of a mining company. Evidence of the nature of the company ought to have been given, to show that, in order to carry into effect the purposes for which it was instituted, it was necessary that individual members should have the power of binding the others by drawing and accepting bills of exchange. In the absence of any such evidence, I am of opinion that it is not competent to individual members of a mining company (which is not a regular trading company) to bind the rest by drawing or accepting bills. One of several persons jointly interested in a farm has no power to bind the others by drawing or accepting bills, because it is not necessary, for the purposes of carrying on the farming business, that bills should be drawn or accepted. The object of persons concerned in such an undertaking is to sell the produce of the farm; and though, with a view to such sale, it may be necessary to buy many things in order to raise and put the produce in a saleable state, yet it is not necessary for that purpose that bills of exchange should be drawn. Even if that were

necessary for the purpose of carrying on a mining concern, though not for the purpose of managing a farm, it was incumbent on the plaintiff in this case to have shown, either from the very nature of this company, that it was necessary, or, from the practice in other similar companies, that it was usual; for, if it were necessary or usual, it would be reasonable that the directors should have such a power, and the law would imply it. Besides, this is in form a bill of exchange drawn by the company upon themselves. It is, therefore, in effect, a promissory note. I think it would require more evidence to show that the directors of such a company had power to bind the other members by promissory notes than by bills of exchange. Upon the ground, therefore, that the plaintiff, having had notice of what the nature of the bill was, ought, before he took it, to have ascertained whether the directors had authority to bind the other members of the company by drawing and accepting bills, and to have proved affirmatively that they had such authority, and not having given evidence to show that it was necessary for this mining company, or usual for other similar mining companies, to draw \*or accept bills, and still less to accept bills in this form, I am of [\*570] opinion that he is not entitled to recover.

PARKE, J.—I am also clearly of opinion that there ought to be a nonsuit or a new trial. This was an action upon a bill of exchange against the defendant as one of the drawers or acceptors. The bill was not drawn or accepted by the defendant himself; and, therefore, the plaintiff was bound to show that the defendant, either expressly or impliedly, authorized the drawing or accepting of the bill of exchange; and it makes no difference in my mind, that the plaintiff was the holder for a valuable consideration, because, though he was such a holder, he was bound to make out his case, and for that purpose to show an authority from the defendant. There is no pretence to say that there was any express authority to draw or accept this bill of exchange; and there is no pretence to say that the drawing or accepting of this bill was subsequently ratified by the defendant; and, therefore, the plaintiff proposes to show that there was an implied authority, and that implied authority, it is said, arises from the relation of partner.

Now, undoubtedly, if there is a complete partnership between two or more persons, one partner does communicate to the other standing in the relation of complete partner, all authorities necessary for carrying on the partnership, and all authorities usually exercised by partners in the course of that dealing in which they are engaged. The plaintiff, therefore, must begin by showing that the defendant stood in the situation of complete partner. He says, I can show that; in the first place, because the defendant has represented himself to be so. And if it could have been proved that the defendant had held himself out to be a partner, not "to the world," for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it and believed him to be a partner, he would be liable to the plaintiff in all transactions in which he engaged and gave credit to the defendant, upon the faith of his being such partner. The defendant would be bound by an indirect representation to the plaintiff, arising

from his conduct, as much as if he had stated to him directly and in express terms that he \*was a partner, and the plaintiff had acted [\*571] upon that statement. There is, however, no reason in this case to say that the defendant ever held himself out to the world, still less that he held himself out, either directly or indirectly, to the plaintiff as a partner. Therefore, upon the ground of representation, he is not liable.

It is next said that he was bound, because he was, in point of fact, a partner. It is to be observed, that amongst the circumstances relied upon to show that, was the fact of the defendant's attendance at some meeting of the shareholders; but as the learned judge shut out the evidence of what passed at the meeting at which the defendant attended, that attendance ought not to have been used against him; and therefore, on that ground, it seems to me there ought to be a new trial.

But I think that, in this case, it is very difficult to say that there was sufficient evidence to go to the jury that the defendant actually was a partner; because all the acts proved and relied upon at the trial were equally consistent with the supposition of an intention on his part to become a partner in a trade or business to be afterwards carried on, provided certain things were done, as with that of an existing partnership. There is a great difference between the two cases. If there is a contract to carry on any business by way of present partnership, between a certain definite number of persons, and the terms of that contract are unconditional or complete, I have already said that the partners give to each other an implied authority to bind the rest to a certain extent. But if a person agree to become a partner at a future time with others, provided other persons agree to do the same, and advance stipulated portions of capital, or provided any other previous conditions are performed, he gives no authority at all to any other individual, until all those conditions are performed. If any of the other intended partners in the meantime enter into contracts, it seems to me to be clear that he is not bound by them, on the simple ground that he has never authorized them, (always supposing that he has not held himself out, directly or indirectly, to the party with whom the contracts are made, as having in substance given that authority.) In those cases in which a plaintiff has not been induced by the defendant's representation to give credit to him, but seeks to fix [\*572] him because he has really \*authorized the contract to be made, the plaintiff must show that authority, and an authority upon condition not performed, is no authority at all.

For these reasons, I should say a new trial ought to be granted, upon the ground that no sufficient evidence was given to show that the defendant was a complete partner. Supposing, however, that the defendant was a complete partner, there is another question upon which this case may be decided; that is, that at all events there was not any evidence to prove an authority in the partners in this concern to draw such a bill of exchange as this. I very much doubt whether there is any authority in mining companies arising by implication from the nature of their dealings (and it is to be observed that there was no proof of any usage to do this in such companies) to draw bills of exchange. The argument would

go to this, that all persons who deal in the produce of the land which they jointly occupy, because they might sell that produce at a distance, would have an implied power given to each other to draw bills of exchange for the purpose of receiving payment for it. If the argument was valid, it would show that farmers acting in partnership, as well as miners, would have, as incidental to the relation of partners, an authority to draw bills of exchange upon the persons to whom the produce of the land was sold. There is, however, no necessity to decide that point, because there is no ground, at all events, to say that mining partners have an implied authority from one another, arising from the nature of their business to draw such a bill of exchange as this; for, upon the face of it, this is a bill drawn by the company upon themselves, and though it is in form treated as a bill of exchange, it is in substance only a promissory note; and the effect of saying that one member of a company like this can draw such bills or promissory notes, would be, that each of the partners in the concern would have the power of pledging the others, not only to the extent of the goods the company might sell in the course of their ordinary dealings, but without any limit at all, inasmuch as one partner might raise money to any amount by drawing bills of exchange, and if they were passed into the hands of innocent indorsees, the partners would be liable to the full extent of their fortunes.

\*It appears to me, therefore, that there ought to be a nonsuit, on the ground that the alleged partners had no authority to draw [\*573] a bill of exchange of this description.

I offer no opinion upon the question, whether the evidence that was offered of the fraudulent concoction of this company would, if received, be an answer to this action. It has been assumed in argument, with reference to this part of the case, that the plaintiff believed the defendant to be a partner; and undoubtedly, if the defendant, though he had been induced to enter into the partnership by fraud, had represented himself to the plaintiff as a partner, he could not avail himself of the fraud as any answer to a plaintiff whose situation had been altered in consequence of that representation. That, however, is not this case. This is a case of an alleged actual partnership, and the plaintiff must show a partnership in order to fix the defendant, and the question is, Whether, if that defendant has been induced by fraud to enter into it, it is any partnership at all, for this purpose? It is not necessary to give any opinion upon that question at present; but I conceive that it is one of considerable nicety.

Rule absolute for a nonsuit.

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WHERE SEVERAL PARTIES ENGAGE IN AN ADVENTURE, AND ARE TO SHARE IN THE GENERAL PROFITS OF THE CONCERN, BUT WHERE EACH PARTY IS TO FURNISH HIS OWN SHARE OF WHAT IS NECESSARY FOR THE CONTINUOUS PROSECUTION OF THE ADVENTURE, SUCH AS HORSES

IN THE RUNNING OF A STAGE COACH, THE WHOLE PARTNERS ARE NOT LIABLE FOR CONTRACTS MADE BY ONE PARTNER IN REFERENCE TO WHAT HE IS BOUND TO CONTRIBUTE FOR THE PROSECUTION OF THE ADVENTURE.

# I.—BARTON v. HANSON.

June 8, 1809.—E. 2 Taunt. 49.

THIS was an action brought to recover the price of some hay and corn, which appeared, by the evidence given upon the trial, at the Lent assizes, 1809, for the county of Kent, before Macdonald, \*C. B., [574] to have been furnished by the plaintiff under the following circumstances.

The defendants between them were generally concerned as proprietors of a stage coach, running from Hastings to London. They divided the road between themselves into different quarters; and the separate proprietors were severally the owners of the horses which drew the coach through their respective districts, and of the harness; and severally provided their stabling, food, and horse-keepers in those districts. The defendants Hanson and Tibbs were the proprietors of the horses which drew the coach in the Lamberhurst quarter. Hanson occupied a stable at Lamberhurst, of which the plaintiff was the owner, and a farm, on which the horses were employed in husbandry business at times when they were not drawing the coach. None of the other partners had any property in these horses, or contributed to furnish them with corn or hay. The goods in question were delivered for the use of these horses at the stable at Lamberhurst, and the plaintiff had received part of the price by a bill which he drew on Hanson and Tibbs solely. It was also proved, that Hanson being unsuccessful, the plaintiff expressed his fears that he should not get paid the residue. The defendants proposed to prove that it was notorious on the road that the separate defendants horsed the separate stages, and that the tradesmen along the road gave credit to the defendants separately for whatever goods they furnished. But the judge held that evidence of these facts was not admissible. The profits arising from the coach were divided among the defendants in proportion to the number of miles which they respectively drew it.

*Best*, Serjt., for the defendants, contended, on the authorities of *Saville v. Robertson*, 4 T. R. 420, and *Coope v. Eyre*, 1 H. Bl. 37, that the defendants were not all jointly liable, and that the plaintiff, therefore, must be nonsuited; but the judge left it to the jury to decide, whether the plaintiff gave credit to Hanson and Tibbs only, or to the whole concern, for that the particular arrangement made between the partners might not be notorious to all the world; and since all the parties proportionably \*shared the general profits of the business, [575] all might be liable to pay for the goods furnished for the purpose of producing that profit; and it was more probable that the plaintiff should be willing to give credit to the whole concern, than to a particular individual. The jury found a verdict for the plaintiff.



*Lens*, Serjt., now showed cause against the rule which Best had in the last term obtained, for setting aside the verdict, and entering a non-suit, or having a new trial. This mode of sub-dividing the work of a coach on a long road is very common; the partners agree among themselves who shall horse particular stages, and they often shift them; but the effect, as relating to others, is not such but that the persons who supply goods supply them to the whole concern; and the entire partnership, which has the benefit of them upon every adjustment of the partnership account, pays for them as part of their general outgoings. And this, he suggested, was the mode of conducting the business between these partners.

The court, without hearing Best, were clear that the evidence, as stated, left no ground for this supposition. The utmost that could be said upon it in favour of the plaintiff was, that he let the horses to the concern for this stage; but if his argument was founded on the ultimate mode of making up the accounts between the partners, he could at present proceed no further: for that fact did not appear.

Rule absolute for a new trial.

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## II.—JARDINE v. M'FARLANE.

Feb. 16, 1828.—S. 6 S. 564.

THE three advocates, along with one Gardner, and certain other persons, were engaged in a joint partnership or adventure for running a stage coach, called the Telegraph, between Edinburgh and Glasgow. The manner in which the concern was managed was this:—

\*The coach was contracted for from a coach-maker for a certain annual allowance which came out of the general fund of profits, [\*576] and each of the partners undertook to convey it a certain number of miles, of which he bore the whole expense, the horses being his own private property, kept in his own stables, and by his own servants; and, on the other hand, each partner drew a proportion of the profits, after the deduction of certain general or common expenses, effeiring to the number of miles for which he undertook. The tickets were sold at Glasgow by two of the advocates, Reid and Jackson, and by Gardner, and at Edinburgh by Mackay, another partner; and each of these parties was allowed from the general fund £5 at each two-monthly settlement, stated in the accounts as "office" money, which, with the money received for booking parcels, was the only remuneration for their trouble in selling tickets. Jardine, Reid, and Mackay, being hotel-keepers, appropriated one of the rooms in their hotels as an office, while Gardner was obliged to rent an office. For this purpose he, several years ago, took from one Marquis, by verbal agreement,—but whether in his own name, or in that of the coach concern, did not appear,—a shop, No. 625, Argyll Street, Glasgow, over which he had painted "Telegraph Coach-office;" but he also had an advertisement in the window, announcing

post-chaises and noddies to be let. The coach started from this office, and on one side of the coach was painted J. Gardner and Company, while on the other there was painted Mackay and Company, the coach starting from Mackay's hotel in Edinburgh; and in the Glasgow Directory there was entered "Gardner, J., and Company, Telegraph Office, 625, Argyll Street." It appeared from a proof led in the Inferior Court that Gardner alone had engaged and paid the clerks employed in the office, and had always settled for the rents; but the receipts were granted to "J. Gardner and Co." In 1821, Gardner was sequestrated, and his share of the Telegraph concern was exposed for sale; but it was bought in for himself, and he continued to have an interest in it till Whitsunday, 1823. In January, 1822, the respondent M'Farlane purchased the shop occupied as a coach-office from the son and heir of Marquis, by whom it had been originally let, and obtained an assignation to the rent for the \*half-year then current. Having failed [\*577] to recover this rent from Gardner, against whom individually he had obtained decree, he raised an action before the magistrates of Glasgow, setting forth that "J. Gardner and Company, Glasgow, John Gardner, John Reid, Thomas Jackson, and Peter Jardine, as individual partners of the said company, or of the Telegraph or Telegraphic Coach Company, carried on under the firm of J. Gardner and Company, or of some other firm unknown to the pursuer," were indebted to him £21, 10s., as the half-year's rent, from Martinmas, 1822, till Whitsunday, 1823, of his shop "occupied and possessed as the Telegraph Coach-office," and concluding for payment.

In defence it was pleaded that the shop was taken and possessed by Gardner as an individual, and not by or for behoof of the general concern, and that the firm of J. Gardner and Company had been assumed by him individually.

The magistrates allowed a proof, in which the facts above narrated were established, and in the course of which the defenders tendered as a witness Gardner himself, who had been assoltized from the conclusions of this action in respect of the prior decree against him individually, and who now had ceased to have any interest in the concern. The magistrates refused to admit him; and thereafter found, "that in whatever manner the defenders might arrange as to the part to be undertaken by each individual, in running their coaches to Edinburgh, as regards their liability to each other, their connection, so far as regarded the public, was no other than that of an ordinary partnership, involving the ordinary general liability to the public for the furnishings made for the use of the business; and that the defenders Jardine and others have not established the cessation of their connection with the other defender Gardner;" and therefore decerned in terms of the libel.

Jardine, &c., thereupon brought an advocacy, in which, besides contending that the magistrates should have admitted the evidence of Gardner, they pleaded,

1. That the action was incompetent against them alone, the [\*578] \*other partners of the concern not being called; as to one of

whom (Mackay) the pursuer could not be ignorant of his being a partner, his name appearing upon the coach itself; and,

2. That the office having been taken by Gardner individually, and used by him as an individual partner, having an independent and separate interest, in proportion to the number of miles undertaken for by him, and not for behoof of the concern generally, the company were not liable for the rent, any more than they would be for that of the hotels in which the other partners who sold tickets had their office.

To this it was answered,

1. That the objection to all the partners not being called was not taken in the court below; and at any rate, as the concern was carried on at Glasgow under the firm of J. Gardner and Company, the company (if a proper copartnership) was sufficiently called by the action being directed against that firm; and if it was a mere joint-adventure, it was sufficient if a pursuer called such of the adventurers as he knew, or had most ready access to; and,

2. That as the firm of J. Gardner and Company was that under which the business was conducted at Glasgow, and was so painted on the coach itself, and as the shop was possessed by Gardner under the firm of J. Gardner and Company, and was allowed to bear the sign of the "Telegraph Coach-office," the partners must be considered as having held themselves up to the public, and possessed the shop, as "J. Gardner and Company,"—the more especially as it was used for the purpose of selling tickets for the coach, which was matter of general behoof, and therefore liable for the rent.

The lord ordinary pronounced an interlocutor, which, after finding the several facts established in the case, proceeded as follows:—"Finds that, under the above circumstances, John Marquis was, and the respondent is, warranted to hold that the shop was tenanted, not by Gardner the bankrupt, as an individual, for himself only, but by and for the partners of the Telegraph Coach concern under the firm of Gardner and Company; and that the complainers, as such partners, were and [\*579] \*are bound to answer for the rent above mentioned of the same, as being so tenanted: Finds the plea now stated, that there are other partners of the Telegraph Coach concern who ought to have been made parties in this action, cannot now be admitted, in respect the complainers did not allege there were such partners, and require them to be called in their defence against the action in the Inferior Court: Finds the objection to the admission of John Gardner as a witness was a sufficient objection, in respect that he was originally a defender in this action as a partner in the Telegraph Coach concern, and so liable to be decerned against along with the other defenders as such partners; and though he was assolizied, yet the *absolvitor* appears to be erroneous, and open to be reviewed, in case Gardner should deny that he was in any respect liable as such partner; and therefore, on the whole, remits the cause *simpliciter* to the magistrates and decerns."

Jardine, &c., having reclaimed against this interlocutor, the court altered, advocated the cause, and assolizied.

Lord GLENLEE.—So far as Gardner was held up to the public as repre-

senting the company, the whole partnership would have been liable as in regard to a parcel delivered to him. But it is very different as to the rent of the office; and the best evidence on this point is that of Gardner's own clerk, who says he never thought of looking to any other person but Gardner for his salary. Then, as to Marquis, in right of whom the pursuer stands, he never thought of the proprietors of the Telegraph Coach concern, but only of Gardner; and it would be very odd if this man was to be placed in a better situation. But it remains to be considered if, *ex facie* of the accounts, this was a partnership transaction; and it is perfectly clear that it was not. An allowance of £5 was made to him for the office, which does not correspond at all with the rent. If it had been the sum of £21, which was the amount of the half-year's rent, it would have been very different; but there is just the slump £5 for trouble and office; and even though it were a circumstance of evident benefit to the company, it cannot make any difference if the whole [\*580] burden was not laid on their \*shoulders, and it is not material whether there was any other business carried on or not; but, except last year, there was other business transacted in it, and even as to that year is a matter of uncertainty; and I therefore think the interlocutor must be altered.

LORD PITMILLY.—I concur.

LORD ALLOWAY.—I think this case falls under the rule of the English case of Hanson. It is quite clear, as to tolls and mile-duty, and the keeping up the coach, that the whole partnership are liable; but when we come to the individual accounts there is only an individual responsibility. The company can only be liable on two grounds,—either that the shop was taken by the company, or that it was totally in *rem versum*. But I cannot infer that Gardner and Company was the firm of the partnership, any more than Mackay and Company. Then, if solely in *rem versum*, they might be liable; but that is not the case.

LORD JUSTICE-CLERK.—I am of the same opinion.

IN SCOTLAND IT HAS BEEN HELD THAT THE RESPONSIBILITY OF SHAREHOLDERS IN A JOINT STOCK COMPANY, TRADING UNDER A DESCRIPTIVE NAME, IS LIMITED TO THE EXTENT OF THEIR SHARES IN THE COMPANY.

### STEVENSON v. M'NAIR.

Dec. 14, 1757.—S. M. 14667. 5 B. S. 340.

IN order to advance the fishing trade at the mouth of the Clyde and through the Western Isles, certain persons, forty in number, entered into a private society, known by the name of the Arran Fishing Company. It was agreed that each subscriber should pay £50 sterling, which made a capital stock of £2000; and directors and overseers were named for prosecuting the purposes of the contract.

\*It was further agreed, that the trade should be carried on by certain directors therein named ; and by one clause the directors [\*581] are "empowered to give such orders and directions concerning the stock and management of the whole of the company's affairs as to them shall seem meet, which shall be binding on all the partners to the extent of their respective subscriptions, until the same (viz. orders and directions) shall be altered by a general meeting," which was confirmed by another clause, in these words :—"Provided, nevertheless, that nothing herein contained shall be understood to import a power to the directors, or any general meeting, to compel any partner or subscriber to pay or contribute any more money to the stock than the sum by him subscribed." And by two other clauses it was stipulated, "That none of the company's stock should be liable to be affected with the private debts of any of the parties, or to diligence at the instance of any of their creditors, so as to give the creditors using such diligence any other right to the subject than the price at which his debtor's share shall be sold for at public roup : That in the event of any partner's share being affected by legal diligence, and in the event of the death of any partner, and more persons claiming right to his share than one, or the right of that one affected by diligence, it shall be in the power of the directors, or general meeting, to sell the share so affected by diligence, or that shall be claimed by more persons than one, by public roup ; and the company to be only accountable to those having right to such a sum as the share shall be sold for at the roup."

The partners of the rope-work at Port-Glasgow, creditors to the company in certain furnishings, brought a process for payment, not against the company in general, but against two or three of the subscribers who were moneyed men ; being advised that all and each of the partners were conjunctly and severally liable.

The defence was, that the directors could not, by contracting debt, subject any of their partners beyond the sums severally subscribed by them ; and that the defenders having paid into the company the whole sums subscribed by them, they are no \*farther liable. The pursuers, furnishing to the company, followed the faith of the com- [\*582] pany, and must betake themselves to the company's stock for their payment.

The defenders could not be liable in their private fortunes. From the contract, it appears, that the present was not an ordinary society, but was an agreement of a number of gentlemen to carry on a new branch of trade, by a certain limited capital, composed of distinct and equal shares ; that to keep these shares always separate, they were withdrawn from the common rules of succession and attachment ; that the shares were to be under the direction of certain persons, separate from the other funds of the subscribers ; and in such a manner that nothing affecting them should affect their other funds. Such societies are well known in trading nations, and in them it was never dreamed, that the private funds of the partners could be attached for the debts of the company. The French are best acquainted with it, and have derived the greatest advantages from partnerships of this kind of any nation in Europe.

Savary, in his *Parfait Negociant*, second partie, L. 1, C. 1, in giving an account of them, called by him *Societez en commandites*, says, p. 24,—“*Les marchands, et autres personnes qui feront des societez en commandites, doivent bien prendre garde de mettre tousjours cette clause dans l'acte, Qu'ils ne seront tenus à aucune dette de la société; et qu'en cas de perte, ils ne pourront perdre que jusques à la concurrence des sommes qu'ils y auront mises.*” And, in giving the form of such a contract of copartnery, p. 52, the 23d article of the contract is expressed in these words,—“*Toutes les dettes faites et créés, tant par la maison de Paris, que celle de Lyon, seront aux risques, perils, et fortunes, de la dite société, et seront supportées suivant les parts et portions que chacun de nous aura en icelle; suivant qu'il sera dit ci-après. Néanmoins, ne sera tenu à aucune perte que jusques à la concurrence des profits.*”

The lord ordinary repelled the defence, and found the defenders liable conjunctly and severally.

The defenders having reclaimed, the court unanimously altered the judgment of the lord ordinary, and “found that \*the partners [\*583] are not liable beyond their subscriptions, and that the process has not been properly brought, and remit to the ordinary to proceed accordingly.

The grounds of the judgment are thus stated by Lord KAMES :—“The lord ordinary having repelled the defence, and found the defenders liable, conjunctly and severally, the interlocutor was unanimously altered, and the defence sustained upon the following grounds :—There is an obvious difference betwixt the present case, and a company trading without relation to a stock. In the latter case, each partner must be liable *in solidum* to the company's debts; for there is nothing here to limit the credit; and if a partner be liable at all, he must be liable *in solidum*. In the present case the managers are liable for the debt they contract, and each partner is liable to make good his subscription. But upon what medium can he be made farther liable? Not upon the common law; for he neither contracted the debt himself, nor gave authority to contract beyond his stock. The very meaning of confining the trade to a joint stock, is, that each should be liable for what he subscribes, and no farther. This is the very reason why joint proprietors of ships are never subjected beyond the value of the ship. With respect to equity, Grotius justly observes, L. 2, cap. 11, § 13, that it is not expedient to make partners farther liable, because it would deter every one from entering into a trading company. To show the inexpediency, and even the absurdity of making each partner liable for the whole debts of a company having a joint stock, consider only the Whale Fishing Company, composed of a vast number of partners for the subscription of £35 each. According to the interlocutor pronounced by the lord ordinary, any one partner, loaded with the whole debts of the company, might be crushed to atoms in a moment.”

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[\*584] \*1. Professor Bell in his commentaries observes, “The law of Scotland has recognised a distinction between the nature, character, and effect of

joint-stock companies, and those of private partnership, conferring the responsibility of shareholders in such companies to the extent of their shares. This great question was tried about the middle of last century in the case of the Avon Fishery Company. The doctrine established in that case was, that there is a clear distinction between the case of a joint-stock company and that of a company trading without relation to a stock. That in the former the managers are liable for the debts which they contract, while each partner is bound to make good his subscription. That there is no ground of further responsibility against shareholders, neither on their contract, nor on any ground of mandate, beyond their share; the very meaning of conferring the trade to a joint-stock being, that each shall be liable for what he subscribes, and no farther. That in ordinary partnership there is a universal mandate and joint *præpostura*, by which each partner is *institor* of the whole trade to an unlimited extent, each being liable *in solidum* for the company debts. The decision is to be taken as fixing the common law on the question."—2 Bell, Com. 628.

2. In another passage Professor Bell observes, "Whether the effect of a lawful contract entered into with a joint-stock company is merely to confer a right against the common stock, or also to raise a personal responsibility against every partner, has never occurred to be determined, since the case of the Avon Fishery Company already mentioned. But the impression very strongly is, that were such a question to be raised, the personal responsibility would be held unlimited. And to this impression the act of 7 Geo. IV. c. 67, H. 9 and 10, regulating the mode in which bankers' societies in Scotland may sue and be sued, gives some countenance."—2 Bell, Com. 630.

3. By the act, 1 Vic. cap. 73, the crown is empowered to grant letters patent restricting the individual liability of members of joint-stock companies to such extent as may be declared in the letters patent; and in England limited liability may now be obtained by joint-stock companies by complying with the provisions of the act, 18 and 19 Vic. cap. 133, but this act is at present not applicable to Scotland.

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\*A CLUB IS NOT A PARTNERSHIP, NOT BEING A TRADING COMPANY OF PERSONS ENGAGED IN A COMMUNITY OF PROFIT AND LOSS, AND THE MEMBERS ARE NOT LIABLE FOR DEBTS INCURRED BY THE COMMITTEE OF MANAGEMENT FOR WORK DONE, OR GOODS SUPPLIED FOR THE USE OF THE CLUB, UNLESS SUCH COMMITTEE HAD AUTHORITY TO PLEDGE THE PERSONAL CREDIT OF THE MEMBERS OF THE CLUB. [\*585]

### FLEMING v. HECTOR.

Mich. Term, 1836.—E. 2 Mees. & Wel. 172.

THESE were actions brought against the several defendants for work done, and goods supplied, for the use of the late "Westminster Reform Club," of which the defendants were members, under the following circumstances:—

The Westminster Reform Club was established in London in the year 1834, for the ordinary purposes of the clubs existing at the west end of the town, and on a similar footing, except that the members were to be chosen from among those professing political opinions in accordance with the principles of the Reform Act.

At a general meeting, held on the 23d of May, 1835, certain rules were agreed upon for the regulation of the club, which were printed, and of which the following only are material to be noticed :—

“6. That the entrance-fee on admission to the club shall be ten guineas, and the annual subscription five guineas.

“8. That if the annual subscription be not paid within two months from the 14th of April, the defaulter shall cease to be a member of the club.

“10. That [certain persons therein mentioned] should be trustees for the club.

“19. That there should be a committee to manage the affairs of the club, consisting of thirty members, to be chosen by vote at a general meeting of the club.

“22. That there should be two general meetings of the club in each year.

[\*586] “23. That at such meetings an ample statement of the affairs of the club should be presented, signed by the chairman of the committee and the secretary, and such statement should be exhibited in the coffee-room for examination, seven days previous to the meeting.

“28. That all members be expected to discharge their club bills day by day, the steward having positive orders not to open accounts with any individual, and being authorized to refuse to continue to supply parties neglecting to pay what they may owe, after payment is requested.”

A committee had been chosen on the first formation of the club, who took a furnished house in Great George Street for its use at a rent of 1000 guineas per annum. Until the above rules were promulgated there were no written or printed rules ; but resolutions were passed from time to time by the committee for the regulation of the society. The club was dissolved in February, 1836, and the members were called upon to pay a sum of eleven guineas each, in discharge of its liabilities. The defendants, among other members, refused to pay this sum, and these actions were in consequence brought against them.

*Flemyng v. Hector*, which was tried at the last Surrey assizes, before Lord Abinger, C. B., was an action by the plaintiff, a wine-merchant, for wines supplied to the club during the whole period of its existence. It appeared that the defendant was elected a member in April, 1835, and paid his entrance money and subscription, and continued to frequent and dine at the club until its dissolution ; it was proved also that he was in the habit of asking for “*Flemyng’s wine*.” Two sums had been paid by order of the committee to the plaintiff on account of his bill, after the defendant was admitted a member, which were more than sufficient to satisfy the amount of the wine supplied while the defendant was a member ; but they were not specifically appropriated, and the plaintiff applied them in satisfaction of the earlier items of his account. It was contended for the defendant, first, that he was not liable at all merely as a member of the club ; secondly, that at all events the damages ought to be nominal, the payments being a satisfaction of the plaintiff’s demand as against [\*587] the defendant. The \*lord chief baron expressed an opinion against the defendant on both points, and under his direction a



verdict was found for the plaintiff for the full amount claimed, leave being reserved to the defendant to move to enter a nonsuit; and on a former day of this term, Thesiger obtained a rule *nisi* accordingly, against which cause was shown by Andrews, Serjt., Sir W. Follett, and Montagu Chambers; and Thesiger and Platt were heard in support of the rule.

Adams v. O'Brien, which was also tried before the lord chief baron at the same assizes, was an action by ironmongers, who had supplied stoves and other ironwork, and let knives and forks, &c., to hire for the use of the club. The defendant was proved to have attended very frequently; and it was shown that the committee made out a statement of the affairs and liabilities of the club, in which the plaintiff's claim was inserted, and that it was hung up in the coffee-room. In this case also a verdict was directed for the plaintiff, the same leave being reserved as in the former case. Platt obtained a rule for a nonsuit accordingly; Andrews, Serjt. and Chambers, showed cause, and Platt supported the rule.

While these rules were pending, the case of Adams v. Rippon, which was an action by the same plaintiffs, and of the same nature as that of Adams v. O'Brien, was tried before Bolland B., at the sittings in Middlesex. It appeared that Mr. Rippon, besides being a member of the club, had been named and chosen one of the committee; but he was not proved to have acted in that character, or to have taken any part in the proceedings of the club. Application had also been made to him to become one of the trustees, to which he consented; but he was not appointed. Evidence was given of a conversation between the defendant and the plaintiff's attorney, in which the former stated that he knew he was liable, but he had paid a sum of money already, and would pay no more, but would defend any action that might be brought against him. It appeared that he did not pay his subscription for the year 1835-6, until after the expiration of two months from the 14th April, 1835; and it was contended that he thereby ceased to be a member of \*the club from that day, and was therefore, at all events, not liable in [\*588] respect of any goods subsequently supplied. The learned judge considered himself bound by the rulings in the previous cases to direct the jury that the defendant was liable as a member of the club; and he left the question to them whether he continued a member for more than the first year. The jury found that he was a member for one year only, and gave a verdict accordingly for £7, 10s., the amount of goods furnished within that period. His lordship gave leave to move to enter a nonsuit, and such rule having been obtained, Erle and Chambers showed cause, and Platt was heard in support of it.

The following is the substance of the arguments urged on either side in the several cases:—

*For the Plaintiffs.*—The rules can be made absolute only on the ground that there was no evidence to go to the jury of the defendants' liability. The ruling of the lord chief baron at the trial, that every member of a club is *prima facie* liable for goods supplied for the common benefit of the club, is supported by the established practice at Nisi Prius

for many years. The case may be considered either as one of partnership and joint liability, or one of principal and agent. The members are associated together for a common purpose, and for that purpose have a common house of meeting; not certainly for the profit, but for the common advantage and gratification of them all. Wherever, therefore, a contract is entered into by any of them, in promotion of the common purpose, all the members are liable. These orders, having been given by the committee, were consequently binding on the members generally, for whose benefit they were given. But if the case cannot be considered strictly as one of partnership, it was one of principal and agent. The committee, who are delegated by the whole body of the members to manage the affairs of the club, acting in the name and on the account of all the members, must of necessity, from the nature of the institution, have a discretionary power vested in them to make contracts with the tradesmen who are supplying the club with necessaries, and for the purpose of such contracts to pledge the credit of the association. Here the [\*589] first step \*taken was to contract for the hire of a house and the use of furniture, at a rent of £1000 a-year, at a period when it does not appear that ten members had joined the club. That shows that the funds must necessarily have been insufficient to meet liabilities which, in the management of the club, and in the very outset of it, it was essential the committee should incur; and it is impossible to suppose it could be intended that the committee should be personally responsible. As soon as a man becomes a member, it must be taken that he impliedly gives the committee authority to take such steps as were necessary to carry the objects of the club into complete effect. But even supposing they had not such authority originally reposed in them, yet, as the accounts were published to the association, and it was thereby made known to them that the committee had made these contracts, and it does not appear that the members repudiated or made any objection to them, they must be taken to have ratified the acts so done by the committee. With reference to the case against Mr. Rippon, it was urged that, as he was actually appointed one of the committee, he must be held bound by their acts; or that, at all events, as the general rules were not in existence during the period for which he was found by the jury to have been a member, a nonsuit could not be entered, but the question, whether there was an implied contract by him through the committee, ought to be decided by the jury, without reference to the rules. The following cases were referred to:—*Delaunay v. Strickland*, 2 Stark. 416; *Raggett v. Musgrave*, 2 Car. and P. 556; *Raggett v. Bishop*, 2 Car. and P. 343; *Kearsley v. Codd*, 2 Car. and P. 408; *Maudsley v. Le Blanc*, 2 Car. and P. 409; *Braithwaite v. Skofield*, 9 B. and Cr. 401; *Vice v. Lady Anson*, 7 B. and Cr. 409, 1 Man. and Ry. 113; *Burls v. Smith*, 7 Bing. 705, 5 M. and P. 735.

*For the Defendants.*—This clearly cannot be considered in the light of a partnership. It is altogether different from a trading or joint stock company; it is merely the case of an association of a number of gentlemen for a purpose altogether unconnected with any community of profit or loss; each furnishing his own subscription to a given amount, to form

a fund \*which shall be available for all the purposes of the association. Nor is this a case in which the members of the club [\*590] generally can be considered as principals, contracting through the committee as their agents. The rules show clearly that the authority of the committee was limited to managing the affairs of the society, by means of the fund provided for them by the subscriptions. They had no authority, therefore, to incur debts on the credit of the individual members; they ought not to have made contracts beyond the limit of the subscriptions in hand. It is said that the exhibiting of the accounts in the club-house is evidence that the members recognized the contracts therein mentioned; but it could not be thence inferred that the committee had exercised, in making such contracts, an authority larger than that vested in them by the rules. The plaintiffs were bound clearly to make out, by affirmative proof, that the defendants were parties to the contract by themselves or their agents. The cases referred to were almost all cases of partnership in trade, or of joint stock societies. The decision in *Delaunay v. Strickland*, which is the only one at all resembling the present, proceeded on the ground of the plaintiff's personal concurrence in the order. The case against Mr. Rippon does not differ in substance from the others; for although he was named on the committee, it appears that he did not assume the office, nor interfere in any way in the management of the club.

Lord ABINGER, C. B.—I am free to own, that when these cases were tried before me at Guildford, I certainly inclined to the opinion that the defendant was liable; but not supposing the matter to be so clear as not to be worth great consideration, I reserved the point fully for Mr. Platt, in both cases, for the opinion of the court. I had thought, but without much consideration, at the Assizes, that these sort of institutions were of such a nature as to come under the same view as a partnership, and that the same incidents might be extended to them; that where there were a body of gentlemen forming a club, and meeting together for one common object, what one did in respect of the society bound the others, if he had been requested and had consented to act for them. Several cases have been \*cited in the course of the argument, which do not apply, [\*591] with the exception of one of them, to societies of this nature. Trading associations stand on a very different footing. Where persons engage in a community of profit and loss as partners, one partner has the right of property for the whole; so, any of the partners has a right, in any ordinary transaction, unless the contrary be clearly shown, to bind the partnership by a credit; he might accept a bill of exchange in the name of the firm, and as between the firm and strangers the partnership would be bound, although there might be an understanding in the firm that he was not to accept. It appears to me that this case must stand upon the ground on which the defendant put it, as a case between principal and agent; and I am the more inclined to look at it in that light, by an observation made by Mr. Platt in the course of the argument yesterday, on the subject of bills of exchange. I apprehend that one of the members of this club could not bind another by accepting a bill of exchange, acting as a committee man, even where there might be an

apparent necessity to accept, as in the case of a purchase of a pipe of wine: the party might draw a bill, but I do not think he could accept the bill to bind the members of the club. It is, therefore, a question here how far the committee, who are to conduct the affairs of this club as agents, are authorized to enter into such contracts as that upon which the plaintiffs now seek to bind the members of the club at large; and that depends on the constitution of the club, which is to be found in its own rules; and upon two of the cases, those that were tried before me at Guildford, looking at these general rules, it certainly does strike me that it is impossible to interpret them so as to give the committee the power of dealing on credit, even for the purposes of the club. It appears by the rules, that every member is to pay his subscription of ten guineas as entrance-money before he can become a member, and a yearly subscription of five guineas; so that by the provisions of the club, there is to be a fund in hand in order to bear the expenses. But then, again, every member who makes use of the club, who either eats or drinks there, or takes any sort of refreshment, is to pay ready money. That shows again that the club was not disposed, and not intended, to have any transactions *on credit*, even with its own members; and it also shows [\*592] that care was taken to provide ready money to meet every expense, so that if a party, or a gentleman of the club, were to order any particular thing that the club did not contain, he is to pay for it *instantly*; so that no occasion was expected to be necessary for the committee's pledging the credit of the club, or even their own. Under these circumstances, as the rules of the club, which are in writing, must be taken to form the constitution of the club, and are to be construed as matters of law, I do not see what there was to go to the jury,—I do not see anything in these rules of which the jury are to be the judges. The words are, “to manage the affairs of the club,”—the question then is, what the affairs of the club are. They are to have in their hands a subscription, and they are to take care that every member pays it before he comes into the club, and pays for everything he has in the club. It therefore appears that the members in general intended to provide a fund for the committee to call upon. I cannot infer that they intended the committee to deal upon credit, and unless you infer that that was the intention, How are the defendants bound? It is very true that an order was made to pay Mr. Flemyng so much on account, but the moment you state the case as one of principal and agent, you see that something more was necessary in order to fix the defendant than the mere fact that the committee did not pay the money the moment they ordered the wine. It has been decided in several cases, that where a party gives his agent money to obtain goods, which the agent obtains on credit, the principal is not liable; so that, even if the defendant knew,—supposing that he was to be presumed to know from the books of the committee,—that there was a payment made to Flemyng, yet there is no account by which it has been proved that the committee had no money to pay it; there has nothing been proved which is required to be proved in order to fix the principal. Suppose a man gives money to his coachman to enable him to purchase hay and corn,—if the coachman takes the money and obtains the things

either on his own or his master's credit having the money in his pocket, his master is not bound; but if no money has been given, we must suppose it matter of necessity, and that he did buy on his master's credit. It appears \*then, there is no evidence to show that at the time this wine [\*593] was ordered, or the sum of £100 paid, the committee had not funds in hand, or at least Mr. Hector had no reason to suppose they had funds in hand. If they had, it was immaterial to him whether they chose to pay immediately, or whether they rather chose to pay at stated periods. I therefore think, upon these grounds, that in both these cases there ought to be a nonsuit entered. With respect to the case tried before my brother Bolland, the only difficulty I see in that case is Mr. Rippon's saying to the attorney's clerk that he might be liable, but that he would take the opinion of a court of law upon it; and Mr. Baron Bolland, knowing what had been held in the two cases that were tried at Guildford, declined to nonsuit the plaintiff, reserving the point for the defendant's counsel; and he then left to the jury this question:—"That supposing Mr. Rippon to be liable as a member of the club, then the question was, Whether what he had said to the attorney's clerk made him a member beyond the period of the 14th of June, or whether it did not?" The jury found that it did not, and that he was only a member up to the 14th of June. The verdict of the jury was plainly founded upon this,—they thought him liable merely by being a member, and that he was liable in the smaller sum, being the debt incurred during that time. In point of fact, I think there was nothing to leave to the jury. Supposing I am right in the opinion I now form, the mere fact of his being a member was not sufficient evidence; the conversation he had with the attorney's clerk shows that he meant to dispute his liability in a court of law, and it cannot be said that he chooses therefore to make himself liable. I think, therefore, the case tried before my brother Bolland must follow the same course as the others—that judgment of nonsuit must be entered. Now it may be said, and it has been urged very properly, and I own it made a considerable impression upon me, that it never could have been supposed that noblemen and gentlemen forming the committee in a voluntary association of this kind would consent to pledge their own credit individually; and I quite agree with that proposition; but I think, if the committee found they had not funds sufficient to carry the purposes for which the club was founded into effect, namely, that \*it should [\*594] be a ready-money affair, they ought to have called a meeting, and exposed the state of the club, and called upon the society to support them. It is very well known that in many of these recent establishments great expense has been incurred by building, and though the committee may have signed contracts for the building, yet it has always been done after a general meeting, and the sense of the whole club has been taken upon it; for you cannot suppose they would pledge their own credit to pay the builder's bill. So in these cases, if the subscriptions of the club were not sufficient to enable the committee to furnish the provisions,—if they were run out,—it appears to me that the committee ought to have called the club together, and asked for a further subscription, and have said, "It was not the intention of the club that we should make

ourselves liable,—the intention of the club was to supply us with money beforehand,”—that is what the committee ought to have done. On the whole, I am of opinion, that the defendants are not liable.

PARKE, B.—I am entirely of the same opinion with the lord chief baron, and I must own, that since I have heard the report read, and made myself acquainted with the circumstances, and have had an opportunity of considering the rules of this club, which form its true constitution, I have not entertained a doubt as to the non-liability of the defendants.

This is an action brought against the defendant on a contract, and the plaintiff must prove that the defendant, either himself or by his agent, has entered into that contract. That should always be borne in mind in cases of this class; for on most questions of this kind the real ground of liability is very apt to be lost sight of. As the defendant did not enter into the contract personally, it is quite clear that the plaintiff cannot recover against the defendant, unless he shows that the person making the contract was the agent of the defendant, and by him authorized to enter into the contract on his behalf; and the question is in this case, whether there was sufficient evidence to go to the jury to satisfy them that the person who actually ordered these goods was the authorized agent of the defendant in making the contract; and that really is the \*question in all cases of this kind—in all cases of principal and agent, master and servant,—wherever the contract is not made personally by the defendant. It is said in this case that the order was given by the committee, and that they were the agents of the members generally; but the question is, Whether there was any sufficient evidence to go to the jury that they were authorized by the defendants to enter into and make these particular contracts on their behalf? In the case of *Flemyng v. Hector*, it is said there was sufficient evidence of one fact, namely, that he was a member of the club, and next, that the whole of the debts were debts contracted on account of the club; and that this is evidenced by the written rules. That is a question of construction, and therefore a question of law; and it is upon the construction of these rules that the liability of the defendant depends, so far as the case depends upon his being a member of the club; and both these cases, of *Flemyng v. Hector*, and *Adams v. O'Brien*, resolve themselves into questions of construction as to the meaning of the original rules of the club. It appears to be quite clear that the club was formed upon ready-money principles; the committee did however enter into some contracts upon credit, and it is said the defendant has sanctioned this,—of which there is no evidence at all; and the case could go to the jury only on the ground of there having been such sanction on the part of the defendant. First, as to the construction of the rules of this club. On referring to these rules, it appears to be clear, that the intention of the club was to provide a fund, to be administered by the committee, and to provide the means of the society's carrying on their concerns, without the necessity of dealing on credit. [His lordship read the 5th, 6th, 7th, and 28th rules.] It is quite clear, from the provisions of these rules, that the society contemplated that there should be a fund in hand to meet the expenses. The

19th rule, which is relied upon as giving the committee authority to bind the defendants, only provides that they shall manage the affairs of the club. Now, I think it is impossible to come to any other conclusion on the true construction of these rules, than that all the committee was to do, was to manage the fund thus supplied; and if they chose to enter into contracts upon credit when they had not sufficient funds, that is their \*own affair. There is no evidence in the case to warrant any conclusion that a society of this nature should have gone on [\*596] dealing upon credit: all the committee had to do was, either to pay ready money, or not to enter into any contract until they had money in hand; or if they chose to do so, it was mere matter of convenience, and they were not to suppose they were binding the members individually to pay, for they had the means of payment in their hands. I have no doubt that is the true construction to be put upon the written documents. There is no evidence to show that the defendant had given authority to the committee to act as his agents, so as to render him liable on a contract of this kind; and it should be shown affirmatively by the plaintiff, that he had assented to their trading in a different manner from that which is contemplated by the rules. The only thing given in evidence was an order to pay a sum of money on account, on behalf of the members of the club, to Mr. Flemyng, but the defendant is not proved to have sanctioned this; and even if he had, there is no proof that he knew at the time that the committee were not in funds when they entered into the contract. The committee might at any time, pursuant to their original authority, have entered into a contract for the purchase of wine, when they had money in the banker's hands, and there is no proof they had not, at the time of the alleged contract, money in hand, or if they had not, that the defendant knew anything of it. The inference sought to be drawn rests altogether on the ground of the committee's not dealing in the way they ought to deal; but if that is to vary the authority given by the original rules, it ought to be shown affirmatively that the defendant did know and sanction it. It seems to me, therefore, that the two cases of *Flemyng v. Hector*, and *Adams v. O'Brien*, stand on the same footing, and that a nonsuit ought to be entered in both. With regard to the other case, the question in fact comes to the same point. It appears that Mr. Rippon was named on the committee, but it is not shown that he ever acted as a committee-man, or sanctioned his being so named, and that ground of liability therefore falls to the ground. It appears also that he was a member before these regulations were published; but the only piece of evidence in the case that seemed at all to affect him, \*was that on which the chief baron has observed, viz., that when [\*597] applied to by the clerk of the plaintiff's attorney, Mr. Rippon said he knew he was a member of the club, and as such liable; but I think that imports nothing more than that he knew he was a member of the club, as he had paid his subscription for the second year, as well as the first; and then as to his liability, it is nothing more than the expression of his opinion, first, of his being a member of the club, and secondly, of his liability, in which he is wrong. Indeed, in the very same breath, he says he will defend any action that may be brought against him, and

have the question settled. It seems to me, therefore, that the case of *Adams v. Rippon* differs in no respect from the others, and all the cases resolve themselves into questions of law as to the construction of these rules and regulations. I am of opinion, for the reasons I have given, that the defendants are not liable.

ALDERSON, B.—I am of the same opinion. This question turns simply on the authority which the parties who made the contracts had to pledge the credit of the defendants to the plaintiffs. Taking it that the committee have made the contract, and that they are by the rules of the society authorized to manage the affairs of the club, it may follow from that that the defendants have given authority to the committee to discharge the contract out of the funds in their hands; but it is contended on the part of the committee that they had a right to pledge the personal credit of the members, and therefore to make these defendants liable. I think they have not. When I come to look at the rules of the club, which are to be the guide by which we are to act, and which constitute the only authority the committee had, I do not find anything to lead me to the conclusion that the authority of the committee extended to the right of pledging the personal liability of any of the members of it; on the contrary, I find the members of the club carefully provided a fund, which was to be collected before they became members of the club, and having collected that fund, and provided it, the committee are to manage it. Then what is it the committee are to manage? Why, the fund so provided, and to manage the club upon those terms. If that [598] \*be so, the committee are not authorized to pledge the credit of individual members; and if they do deal on credit, it is their own affair, done on the faith of the money in their hands, which would enable them to pay their accounts. It seems to me there is no pretence for saying, in this case of *Adams v. Rippon*, (which is the only one I have heard, and the only one I shall enter into on the present occasion,) that the defendant is liable. With respect to the others, I agree in the general principles laid down by the rest of the court, and I have no doubt the application of those principles is correct.

GURNEY, B.—I entirely concur in opinion with the rest of the court, though I was at first disposed to think the defendant was liable. That impression arose out of decisions which, upon examination, appear to have been founded in an erroneous application of the law on the subject of partnership. The discussion, however, which has taken place in this case, has convinced me that this is not the case of a partnership, but of principal and agent; and being a case of principal and agent, it is incumbent on the plaintiff to establish that there was an agency, and that from the members at large, to procure goods upon credit. I am now fully convinced, taking it on the regulations of the club, that there is not such an agency here. There is one fact established, namely, that immediate payment was expected from every member; and the committee could deal with those funds in providing all the necessities required for the purposes of the club; and if they were called upon to do more, they ought to have applied for further authority. I concur there-



fore in opinion with the rest of the court, that in all the three cases judgment of nonsuit should be entered.

ALDERSON, B., then added, that Bolland, B., had intimated his concurrence in the opinions about to be delivered in these cases, before he left the court.

Rules absolute.

\*WHERE A PROJECTED SCHEME OF PARTNERSHIP PROVES ABORTIVE, THE EXPENSE INCURRED IN ORIGINATING THE SCHEME [\*599] FALLS UPON THE ORIGINAL PROJECTORS, AND NOT UPON PARTIES WHO HAVE INTIMATED THEIR CONSENT TO BECOME PARTNERS IN THE SCHEME, AND HAVE ADVANCED MONEY ON THE FAITH OF IT BEING PROCEEDED WITH.

### NOCKELS v. CROSBY.

Hilary Term, 1825.—E. 3 B. & C. 814. Eng. Com. Law Reps., vol. 10.

ASSUMPSIT for money had and received. Defendant pleaded the general issue, and paid £252, 11s. into court. At the trial before Abbott, C. J., at the London sittings after Hilary Term, 1824, a verdict was found for the plaintiff for £47, 15s., subject to the opinion of the court upon the following case :—

The defendants were the directors of a scheme called the “British Metropolitan Tontine.” A printed paper was circulated with their authority, stating (amongst other things) that to effect the objects of the scheme it was proposed to receive subscriptions of ten shillings a week from each member for the period of one year, viz., from the 1st of January, 1821, to the 1st of January, 1822, and that the total amount of such year’s subscription should be deemed a share, and all such shares form one capital or joint stock of the company, with benefit of survivorship; that the amount of the subscriptions would be vested in the names of the trustees, and from time to time laid out in government or other securities, the net proceeds and interest of which would be equally divided among all surviving shareholders twice in every year; that members were to subscribe their names to the company’s rules and regulations at the time of opening their subscriptions, or at any subsequent convenient time, and to abide thereby; that the management of the company was vested in eight directors; and that at the expiration of the year every subscriber would receive a shareholder’s ticket, which would be saleable or transferable. The above was the paper referred to in the following agreement, which was signed by the plaintiff and several other persons :—  
“We whose names are hereunder subscribed do hereby consent and \*agree to, and with the present and any future directors of the British Metropolitan Tontine as follows :—First, we do each of [\*600]

us agree to become subscribers thereto, and to take such numbers of shares upon such life or lives as is or are set forth against our respective names; secondly, we do acknowledge the plan or prospectus hereto annexed to contain the nature and intent of the said Tontine, so far as the same is therein expressed, and do ratify the same in every respect, and agree to abide thereby; thirdly, we do agree to ratify and confirm all rules, laws, and regulations passed, or which shall at any time hereafter pass, for the further promotion, direction, management, and carrying into effect the said Tontine, and to sign any deed or deeds to that effect; fourthly, we do agree to pay our subscriptions for one year." An account was opened with Glyn and Co., bankers in London, entitled "British Metropolitan Tontine." The plaintiff paid two sums of money, amounting together to £308, 6s., to the aforesaid account at Messrs. Glyn and Co.'s. Various other subscribers to the Tontine paid sums of money to the said account, amounting in the whole, with the plaintiff's payments, to £737, 10s. 6d. In the books of the Metropolitan Tontine the following resolutions are entered:—

"General Resolutions of the 19th January, 1821.

"First, that the books of the Tontine be opened to receive subscriptions, and that no less than £2 per share shall be received in the first instance, being for the first monthly subscriptions.

"Secondly, that the affairs and entire management of the concerns of the Tontine be vested in eight directors, any three of whom to be a sufficient quorum for the purpose of transacting business.

"Thirdly, that James Pope be appointed secretary and solicitor to the directors of the Tontine, and that for such secretaryship he be paid such yearly salary as the present or any future directors may think fit.

"Fourthly, that all moneys to be received under or in virtue of the Tontine be paid into the hands of the treasurer or treasurers thereof, and that no moneys be drawn for or paid by the treasurer or treasurers unless by draft, to be signed by not less than three of the directors.

[\*601] "Fifthly, that the directors do, as often as occasion may require, place out at interest, in the names of the trustees, in government or other securities, all sums of money remaining in the hands of the treasurer."

"30th August, 1822.

"Resolved by a quorum of the directors present, that there not being a sufficient sum subscribed to warrant the further prosecution of the scheme, the subscribers have returned to them the amount of the subscriptions less the expenses attending the same, and that such expenses be ascertained at another meeting of the directors to be held at the secretary's house the 6th of September next."

"Old Bethlem, 6th September, 1822.

"Resolved by a quorum of the directors present, that the expenses attending the prosecuting the scheme of the Tontine do amount to the sum of £3, 19s. 7d. per share, and that each subscriber do have the amount of his subscription returned, less the said £3, 19s. 7d. per share."

On the 27th of May 1822, the plaintiff wrote to the directors, request-

ing to have his money returned immediately, and said, he understood it was to be returned subject to some small charge, and he did not then make any objection to the charge.

On the 25th of July, 1822, he again wrote, and complained of the delay in returning his money; and that he had "been put off from time to time in consequence of charges attending the concern."

In September, 1822, several cheques, signed by the defendants, were drawn on Glyn and Co. for different sums, amounting in the whole to the said sum of £737, 10s. 6d., which cheques were paid by them from the money paid into the aforesaid account. One of such cheques for £252, 11s. was made payable to the plaintiff or bearer, and placed by the defendants in the hands of Mr. Pope, the secretary, with instructions to deliver it to the plaintiff; but the plaintiff refused to accept the same in satisfaction of his claim, and the said Mr. Pope, without the knowledge or authority of the said defendants, paid the said cheque into his own private account at the Bank of England, \*through which the same was presented to and paid by Glyn and Co. Previous [\*602] to the commencement of the present action the plaintiff had sued G. C. Glyn, one of the partners in the banking-house of Glyn and Co., for the money sought to be recovered in this action, but had afterwards discontinued that suit. On the trial, Mr. Pope, the secretary of the Metropolitan Tontine, being called as a witness for the defendants, stated, that the expenses of the institution amounted to £3, 19s. 7d. a share, making £47, 15s. on the plaintiff's twelve shares; that the expenses consisted in stationary, printing, advertisements, postages, and £75 paid to the witness for his trouble; that he explained this to the plaintiff, and offered him the balance, £252, 11s., which he refused; that none of the money was appropriated to their own use by any of the defendants. He further stated, that the money paid by the subscribers was not laid out at interest, but remained in the hands of the bankers with whom the account was opened, and that the defendant, George Mitchell, and the witness alone, caused the prospectus to be put forth, and prosecuted the scheme themselves. That the defendant, Crosby, was not a subscriber, and that he attended one meeting only when the cheques were signed.

*Campbell* for the plaintiff.—The plaintiff is entitled to recover back the whole sum advanced. The consideration upon which it was paid failed; the money was, therefore, in the hands of the defendants money had and received to the plaintiff's use. It will, perhaps, be urged, as a defence, that the scheme was within the Bubble Act, 6 Geo. I. c. 18; but first, it was not so; and even if the court should think it was, still the scheme was abandoned, and never carried in any degree into effect. The illegality of it, therefore, cannot alter the present plaintiff's rights. This was not within the Bubble Act, it was not to carry on any wild trading speculation, which manifestly tended to the prejudice of the subscribers, but was a mere association to contribute money with a benefit of survivorship. But even if this were otherwise, the plaintiff would be entitled to recover. When a person sues to recover back money paid on a consideration that has failed, then it is money had and received to his use, and the nature

[\*603] \*of the consideration is out of the question, *Farmer v. Russell*, 1 B. and P. 296. If money paid to a stakeholder on an illegal wager is paid over, it cannot be recovered back; but the rule is otherwise if the money has not been paid over, *Cotton v. Thurland*, 5 T. R. 405; *Smith v. Bickmore*, 4 Taunt. 474. Here the defendants took no steps towards the performance of the contract upon which the money was paid in. It remained wholly unproductive from January, 1821, till August, 1822, when the scheme was abandoned; the plaintiff is therefore entitled to recover back the whole sum advanced. [HOLROYD, J.—Suppose five persons enter into partnership, and contribute £1000 each, they afterwards find the concern a losing one, and put an end to it, can any one maintain an action against the others for his share?] Perhaps not; but this is a different case; at most it was only a proposed partnership, and nothing was done towards carrying it into effect; and it is most fit that those persons who proposed the scheme should bear the expenses. Besides, the directors had no power to make a resolution to deduct the expenses out of the moneys contributed; they had power to make resolutions for carrying on the concern, but not for the abandonment of it; the plaintiff, therefore, was not bound by the resolution in question.

*E. Lawes*, contra.—The defendants are clearly entitled to deduct the money in dispute from the amount paid in by the plaintiff. They did not warrant that the concern would answer, but only proposed that it should be tried, and the abandonment of the scheme was with the plaintiff's assent. That appears from his letters, which were written before the resolution to put an end to the concern was made. They also show that he agreed to pay his proportion of the expenses, for he alludes to the proposed deduction of part of his money to pay those expenses, and does not object to it. But it does not appear that the defendants ever received any of the plaintiff's money; they only gave an order to Pope, and he received, and now has the money. If that were not so, still this action could not be maintained. All the shareholders were jointly interested in the funds of the concern, and the defendants have never stated any account, or bound themselves to pay over any sum \*to the

[\*604] plaintiff. [BAYLEY, J.—Crosby was not interested in the money.] Then the action was improperly commenced against him. In the next place, this scheme falls within the 6 Geo. I. c. 18, § 18. That act is not confined to trading speculations; and here books were opened for public subscriptions; small sums were collected, amounting in the whole to a large sum, the shareholders acted as a corporation, having agreed to be bound by the resolutions and bye-laws of the directors, and the shares were to be transferable. It is therefore precisely similar to that which was determined to be illegal in *Josephs v. Pebrer*, 3 B. and C. 639. [BAYLEY, J.—It might be intended to make the shares transferable, but in fact no shares were ever issued.] The intent to make them so was, together with the other circumstances, in itself illegal, and the whole transaction being illegal, no right of action can arise out of it. [LITTLEDALE, J.—It seems to be nothing more than an agreement by the subscribers to be joint tenants of the money subscribed.]

BAYLEY, J.—I am of opinion that the plaintiff is entitled to recover the

whole sum which he advanced. There is no difficulty in some of the points urged, viz., that the money was not received by the defendants, or that it was drawn out and applied with the concurrence of the plaintiff. The money was originally paid by the plaintiff into the hands of certain persons, who, for the purposes of this concern, were the bankers of the defendants, and it was paid upon a prospect that it should be in the bankers' hands in furtherance of a continuing scheme. It was afterwards drawn out by the defendants, and it was their duty to see to the proper application of it. If they had paid the whole to the plaintiff, or according to his directions, of course he could not complain; but if they applied a part of it without his assent, and in a mode which the law did not warrant, the plaintiff clearly has a right to recover, unless it can be shown that he was party to a scheme within the 6 Geo. I. c. 18. The scheme was not within that statute, unless it was formed for the purpose of carrying on some mischievous project or undertaking, and unless we can predicate of it that it was likely to tend to the common grievance, prejudice, and inconvenience of his majesty's subjects, or great numbers of them, \*in their trade, commerce, or other lawful affairs. The cases of *Rex v. Webb*, 14 East, 406, and *Pratt v. Hutchinson*, [605] 15 East, 511, were decided on that principle. I think that we cannot assume as a matter of law, that this scheme was within the description before given. It is true that a large sum, made up of many small payments, was to be collected; but that was not to be invested in any general speculation, but merely to enure to the benefit of the survivors. *Prima facie* the principal effect of the scheme would be to encourage the saving of money. But this action might be maintained even if the scheme were within the act, for it proved abortive, and no transferable shares were ever created, and the period had not arrived at which it would have been within the operation of the statute. The defendants then having possession of the plaintiff's money, applied it without his express assent. Do they show any matter of law sufficient to justify that application of it? The scheme was set on foot by Pope and the defendants, and the prospectus was circulated with their assent. On all projects some expense must be incurred before many members join the concern. Upon whom should that fall? Undoubtedly, if the scheme proves abortive, it should fall upon the original projectors, and not upon those who advance their money on the faith of its going on. The plaintiff did nothing to render himself liable to the expenses, and it was the duty of the defendants within a reasonable time to lay out in securities the money received. They never did so, but kept it for eighteen months in their bankers' hands, and appear to have acted throughout as if they thought the undertaking must fail. For these reasons, I think that the plaintiff is entitled to the whole of the money which he advanced; and it is also observable that by the third resolution of the directors, Pope was to have such annual salary as the defendants should fix; they never fixed any; it is therefore questionable whether that would not of itself be sufficient to prevent them from deducting that part of the money sought to be retained which was paid to Mr. Pope.

HOLROYD, J.—At the commencement of the argument I entertained [\*606] great doubts upon this question, but am now satisfied \*that the plaintiff is entitled to recover. There is not sufficient in the case to warrant the payment of any part of the money detained to Pope; for even supposing the concern to have gone so far as to authorize the appointment of a salary to him, still in point of fact none was appointed. It appeared to me at first that this was very like the case of a partnership, which I put during the argument, but here the concern was never really set agoing; and I think that the expenses incurred in setting a scheme on foot are not to be paid out of the concern unless they are adopted when it is actually in operation. In the present case a very small sum was collected, and that was not invested in government or other securities, which, by the prospectus, were to be the only source of profit. No tontine could exist until the money was laid out. All the steps taken were therefore only preparatory to carrying the project into effect, and as it never was carried into effect, I think that the plaintiff is entitled to have back the whole of the money that he advanced.

LITLEDALE, J.—I also am of opinion that the plaintiff is entitled to recover upon this general principle, that if persons set a scheme afoot, and assume to be the directors or managers, all the expenses incurred before the scheme is in actual operation, must, in the first instance, be borne by them. When it is in operation the expenses and charge of management should be borne by the concern, and then it may be fair that the preliminary expenses should be paid in the same way; for then the subscribers have the benefit of them. The prospectus put forth by these defendants stated that the money subscribed was to be placed out at interest. The plaintiff's sole object in paying the money must have been to have it so placed out, but during eighteen months it remained idle at the bankers. Suppose there had been no subscribers, then the projectors must have paid all the expenses. If, then, one person only subscribes, are all those expenses to be cast upon him? The hardship and injustice would be monstrous; yet that would be the consequence in such a case were we now to hold that the plaintiff was liable to a proportion of the expenses incurred by these defendants. With respect to the [\*607] supposed partnership, it is \*plain that there could be none until the money was laid out in execution of the proposed scheme. I am, therefore, clearly of opinion that the plaintiff was entitled to recover.

*Postea* to the plaintiff.

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WHERE NO DEFINITE PERIOD OF DURATION IS FIXED, A CONTRACT OF COPARTNERSHIP MAY BE DISSOLVED AT THE WILL OF ANY ONE OF THE PARTNERS, AND A REASONABLE NOTICE OF DISSOLUTION IS NOT

REQUISITE, BUT THE PARTNERSHIP WILL CONTINUE AS TO ALL ANTECEDENT OBLIGATIONS UNTIL THEY ARE DULY IMPLEMENTED.

# I.—PEACOCK v. PEACOCK.

May 1, 1809.—E. 16 Vesey, 49.

ONE of the points raised in this case was, Whether a partnership might be determined without previous notice, where there was no provision as to its duration?

*Argued against the dissolution.*—Reasonable notice must be given to dissolve a partnership, subsisting for an indefinite period:—what notice must depend upon circumstances,—particularly the nature of the business. In a commercial country it is of the utmost importance, that such a question should be determined upon great consideration. The proposition of the defendant, not supported by any authority would produce the utmost inconvenience;—that any partner has the power to declare the partnership dissolved; and at once the dissolution is established; and they are from that moments tenants in common of all the joint property. Consider the inconvenience that may, to a man having considerable property standing out upon security, be the consequence of such a notification, that the concern is from that instant at an end; having nothing in the nature of notice which is necessary for winding up the concern; and as it is reasonable that the party may have an opportunity of inquiring for another concern to which he may transfer his capital.

\*Considering the partnership, therefore, as still subsisting, the plaintiff is entitled to interfere, and to refuse the introduction of [\*608] a stranger, to whose skill, judgment, and integrity, his interests in his opinion perhaps cannot with safety be committed. Even supposing the profits of the person so introduced are to come out of the defendant's share, still the plaintiff may sustain an injury by the possible consequence, in the event of a future dissolution, from the opportunity of connection with the customers.

*Argued for the dissolution.*—These parties to this voluntary engagement, not having fixed any limitation of the period of its duration, are not bound beyond the respective will of each. The connection must be dissolved at the instant that either thinks fit so to declare. The law of this country does not raise the obligation of reasonable notice without defining in some way what it shall be. They had the power of obviating the inconvenience by express stipulation either for continuance or notice: not taking that course, the conclusion is, that they intended the choice of the determination, as of the commencement, of their connection to be mutual. Certainly that arbitrary right to determine will not be allowed to effect injustice with reference to the joint concerns, depending at the determination. For the purpose of winding up those transactions the connection continues, but the effect of this notice is to prevent any new joint engagement. The court will not appoint a receiver except from the necessity of preventing either party from collecting the property, with a view to a future determination.

*Argued in reply.*—The uncertainty of reasonable notice is no objec-

tion; and the mercantile law affords several instances; as, what shall be reasonable notice to discharge an indorser? what the reasonable time for presenting a bill? So, what can be more uncertain than the right of the lord of a manor to a reasonable fine? The notice is capable of being reduced to certainty by the custom of the particular trade, which governs the contracts entered into. It is as important to a trader quitting a business of this nature, as to a tenant quitting a \*farm, to have time [609] to look round, and inquire how he may employ the capital thrown upon his hands. If a partnership can be so determined, it is singular that no instance is produced. The inconvenience and injustice may be enormous. Suppose a quantity of raw material, bought for the purpose of being manufactured, could either partner throw upon the other the loss, which must arise from selling that stock in its original state? Upon such a dissolution of partnership in the trade of a wine-merchant, while cargoes were at sea, could a sale upon the credit of that house, according to the usual course of their business, be thus prevented?

The LORD CHANCELLOR.—The difficulty which struck me when this motion was originally made, and which still continues, is of this nature. The father employed his son in his business; and, as is frequently done by a father meaning to introduce his son, the business was carried on in the name of “Peacock and Co.” It appeared to me, that the son insisting that he had a beneficial interest must be entitled to an equal moiety, or to nothing; that, as no distinct share was ascertained by force of any express contract between them, they must of necessity be equal partners, if partners in anything. In that view, the result of the issue that was directed appears to be extraordinary. The proposition being, that the son was interested in some share not exceeding a moiety, the jury, in some way, upon the footing of *quantum meruit* held him entitled to a quarter. I have no conception how that principle can be applied to a partnership. The parties, however, considered themselves bound by that verdict.

With regard to what has passed since, the question was much agitated at the bar, Whether this partnership is now dissolved by the notice in writing from the defendant, that from and after the date of that notice the partnership should be considered dissolved? The plaintiff insists that it is not dissolved; and that it can be dissolved only upon reasonable notice. I have always taken the rule to be, that in the case of a partnership not existing as to its duration by contract between the parties, either party has the power of determining it, when he may think proper, subject to a qualification that I shall mention. [610] \*There is, it is true, inconvenience in this; but what would be more convenient? In the case of a partnership expiring by effluxion of time, the parties may by previous arrangement provide against the consequences; but where the partnership is to endure so long as both partners shall live, all the inconvenience from a sudden determination occurs in that instance as much as in the other case. I cannot agree that reasonable notice is a subject too thin for a jury to act upon; as in many cases juries and courts do determine what is reasonable notice. With regard to the determination of contracts upon the holding of lands, when tenancy at will



was more known than it is now, the relation might be determined at any time: not as to those matters which during the tenancy remained a common interest between the parties, but as to any new contract the will might be instantly determined. When that interest was converted into the tenancy from year to year, the law fixed one positive rule for six months' notice,—a rule that may in many cases be very convenient; in others, that of nursery grounds, for instance, most inconvenient. As to trades in general, there is no rule for the determination of partnership; and I never heard of any rule with regard to different branches of trade; and, supposing a rule for three months' notice, that time might in one case be very large; and in another, in the very same trade, unreasonably short.

I have, therefore, always understood the rule to be, that in the absence of express contract the partnership may be determined when either party thinks proper; but not in this sense, that there is an end of the whole concern. All the subsisting engagements must be wound up: for that purpose they remain with a joint interest, but they cannot enter into new engagements. This being the impression upon my mind, I had some apprehension from the turn of the discussion here, that some different doctrine might have fallen from the court at Guildhall; but upon inquiry from the lord chief-justice as to his conception of the rule, I have no reason to believe, that if this notice had been given before the trial, the jury would not have been directed to find that the partnership was by the delivery of that paper dissolved. My opinion, however, being such as I have stated, I can do no more in this unhappy case than restrain \*each party from receiving the effects of that partnership, [\*611] determined at the date of that paper, and appoint a receiver of the outstanding estate: *Milbank v. Revett*, 2 Mer. 405; 1 Swanst. 480, 481. This has so entirely altered the views of both the parties, that it is better that any farther proposition should be the subject of another motion.

## II.—MARSHALL v. MARSHALL.

Jan. 26, 1815.—S. F. C.

FRANCIS MARSHALL, the father of the parties in this case, carried on business for many years as a hardware merchant in Edinburgh. In the year 1791, he assumed both his sons as partners, and they carried on the business of jewellers and silversmiths, as well as the hardware trade.

By the arrangements then entered into, old Mr. Marshall had two-fifths of the stock, the pursuer, his eldest son, had also two-fifths, and his younger son, the defender, one-fifth; these parties shared the profits in proportion to their stock.

Mr. Marshall, senior, died in 1803. The pursuer and defender carried on their trade as formerly, under the firm of Francis Marshall and Sons, and the old gentleman's share of the stock was divided equally between

them. The pursuer thus came to hold three-fifths of the stock, and the defender two. No contract of copartnery was entered into by them at this time, but in the year following they entered into an agreement, by which the copartnership was fixed to have commenced upon the 23d March, 1803. This agreement fixed the interest of parties, but nothing was said as to the term of its endurance, and it contained no stipulation as to the dissolution of the partnership.

In 1806 this company acquired a lease of a shop in a favourable situation, for fifteen years.

In October, 1812, the pursuer, from a wish to take two of his sons, who were bred to the business of jewellers, into company with him, and owing to some disagreement between him and the defender, signified to him his resolution to dissolve the partnership at Whitsunday, 1814.

[\*612] \*The defender opposed the dissolution, and the pursuer brought an action to have it found and declared, that he was entitled to dissolve the company. The lord ordinary pronounced this interlocutor:—"Finds, that Mr. Francis Marshall, the pursuer, is entitled to withdraw from the concern, and, in consequence thereof, that the partnership is dissolved; and appoints the pursuer, betwixt — and next calling, to give in a minute, stating the manner in which he proposes to dispose of the shop and of the goods."

Against this interlocutor, to which the lord ordinary adhered, upon advising a representation, with answers, the defender reclaimed to the court, and pleaded:—

That as there was no period of endurance expressed in the contract of copartnery between the parties, it must be held to have been to endure during their lives, or at least while they continued in trade, Vinn. in Inst. 680; Pothier, Tr. du Contract de Société, No. 65, vol. ii. p. 555. He did not contend that a person who entered into such a contract was absolutely and irrevocably bound, through his whole life, to continue in it. He admitted that he might renounce and abandon his concern in it; but he maintained that his renunciation had not the effect of dissolving the partnership, which might be continued by the other partners, provided they did not involve in responsibility the partner withdrawing.

That in law a partner's retiring does, in one sense, infer a dissolution of the society, is true. But that is a matter with which the retiring partner has no concern, which he cannot make a conclusion in any action at his instance, but which is competent only as between the remaining partners. That part of the lord ordinary's interlocutor which finds the partnership dissolved, by the pursuer's withdrawing, it was said, is therefore erroneous.

Farther, though a partner may withdraw from the company, yet he must do so *bona fide*, and not for the purpose of obtaining an advantage to himself at the expense of the company, Inst. lib. iii. tit. 26, § 4; Wood's Comm. ad lib. xvii., Dig. tit. 2, p. 383. Here it is obvious that the pursuer means to gain an undue advantage by dissolving the company. His own \*name happens to be Francis; and, by taking [\*613] his sons into company with him, he retains the old firm of Francis Marshall and Sons, and thus carries off with him the character and

good-will which have been acquired by that concern during these fifty years past. He is not, therefore, in these circumstances, even at liberty to withdraw from the company, as, by doing so, he keeps possession of the firm, which ought to have remained to the defender, as the *residuum* of the company.

If this were a case where there were three partners in the concern, and one of them wished to withdraw, your lordships would have no hesitation in finding, that the two who did not wish to withdraw would be entitled to hold the establishment as undissolved, and to carry it on for their own behoof, maintaining the possession of the shop, and continuing the use of the firm. It can make no difference that there are only two partners, as the petitioner is willing to adhere to the contract, and to continue the establishment. The pursuer, although he cannot be forced to continue in the society, is to be considered as only retiring from it, leaving to the petitioner the *nomen juris* originally established by his father, and designated at this moment by his father's name, and abandoning to him the shop, with all its advantages, he paying to the pursuer the value of his share of the stock.

It was answered :—

Even the foreign jurists quoted by the petitioner, who hold that a partnership, contracted for an indefinite period, is presumed to have been contracted for life, give no sanction to the consequences which the petitioner has attempted to deduce from that presumption. On the contrary, they state, in the most express terms, that the partnership in such a case may be dissolved at the pleasure of any one partner, if this is not done unseasonably or *mala fide*, Vinn. Inst. p. 634 ; Pothier, Tr. du Contract de Société, vol. ii. p. 586.

But it is of little consequence what are the opinions entertained by foreign jurists, as the authorities of the law of England are conclusive against the petitioner upon all the points maintained by him. It appears from these authorities that no such principle is now entertained, as that partnership of an \*indefinite endurance is to be held a contract for life. On the contrary, it is perfectly settled, that [\*614] it may be dissolved by any partner, at any time, without previous notice, provided he acts *bona fide*, and does not catch at an undue advantage from the state of the company's engagements. It is settled that the dissolution of the partnership so effected infers a general sale and account of the joint property, and that the partner is not bound to leave the stock, the premises, the company-firm, or the good-will of the trade in the hands of the rest. Everything must be disposed of for the general behoof. As Lord Eldon expresses it, "A partner not for a term, has certainly a right to say, I instantly dissolve the partnership." And no existing engagements can take away that right, though the concern may be continued for the exclusive purpose of winding it up, Watson on Partnership, 379 ; Master v. Herston, 3 Vesey, Jun. 74 ; Ib., 381 ; Peacock v. Peacock, 16 Vesey, Jun. 49 ; Featherstonhaugh v. Fenwick, 17 Vesey, Jun. 307.

In the law of Scotland the authorities are not so numerous, but the same general principle is recognized, Ersk. b. iii. tit. 3, p. 26.

The petitioner argues that the respondent does not retire *bona fide*, but unseasonably and fraudulently, in order to gain an advantage for himself and his family. Undoubtedly, it is established law, that the renunciation of a partner *debet esse facta bona fide et tempestivè*. But it cannot be maintained that the respondent retires unseasonably, after giving eighteen months' notice previous to the time at which he meant to dissolve the company; and although it will be for the advantage of himself and his family to dissolve the company, it is not an advantage which the law forbids; it meant only to prevent a partner from retiring with the intention of making for himself an advantageous bargain, which he would otherwise have had to share with the company, Pothier, vol. ii. 586, and 587, L. 65, § 5, ff. pro Socio. Here there is no such object in view. The petitioner is equally well known to the customers of the company as the respondent, and has the same chance of carrying with him their future employment.

[\*615] The lords, upon advising the petition and answers, were \*quite clear that the pursuer was entitled to withdraw from the company, and that the effect of his doing so must be to dissolve it. They unanimously adhered to the lord ordinary's interlocutor, (9th December, 1814;) and a second reclaiming petition was refused, without answers (26th January, 1815.) The case afterwards went back to the ordinary, to settle the effects of the dissolution of the company upon the interest of the parties in the shop and stock.

WHERE A PARTNERSHIP IS CONTINUED AFTER THE EXPIRATION OF THE ORIGINAL TERM PROVIDED FOR ITS DURATION, BUT NO TERM FOR THE CONTINUANCE IS FIXED, THE PARTNERSHIP MAY BE DISSOLVED BY ANY ONE OF THE PARTNERS, IN THE SAME WAY AS IF NO TERM HAD BEEN ORIGINALLY PROVIDED FOR ITS DURATION.

### FEATHERSTONHAUGH v. FENWICK.

April 18, 1810.—E. 17 Vesey, 307.

In the year 1783, the plaintiff entered into partnership with George Fenwick, Clark, and Faremond, in the business of manufacturing glass, for the term of fourteen years from the 13th of February, 1783. The articles contained a provision, that, in case any of the partners should at any time be desirous to dispose of their respective interests in the partnership, and should give twelve calendar months' notice thereof in writing, at the end of such twelve months the partnership should cease and determine, so far as concerned such partner giving notice; and that the other partners, or any of them, should have the preference of purchasing the interest of such retiring partner at a fair valuation. By another clause it was provided, that at the expiration of the term the joint stock

should be equally divided among the partners, their executors, and administrators.

The business was at first carried on at Ayreskey, in the county of Durham; but afterwards they obtained a lease from \*Mr. Lambton, of glass-houses and premises at Panns, in the same county, and [\*616] also of a free-stone quarry for the term of fifteen years from the 22d of November, 1789, as tenants in common; with a proviso, that if the lessor, his heirs, or assigns, should be desirous that the furnaces, kilns, and other utensils erected on the premises, should remain thereon after the expiration of the lease, three months' notice of such intention should be given previous to the expiration; and then they should be taken at a fair valuation; and, in case such notice should not be given, the partners might remove them.

The partners worked the stone quarry upon the same terms on which the manufactory was carried on. At the expiration of the partnership, on the 13th of February, 1797, all the shares were by purchase vested in the plaintiff and George Fenwick, who became interested in equal moieties, and continued to carry on the business as usual without any new agreement. In June, 1799, they took a lease for the partnership purposes of a warehouse in London for a term of nine years. In 1801, Addison Fenwick, the son of George, was admitted to a moiety of his father's interest in the concern, and was appointed a manager with a salary. They also occupied a brick-field, contiguous to the glass-works, as tenants from year to year under Mr. Lambton, until 1805, the profits of which were brought to the partnership account.

In September, 1804, George and Addison Fenwick applied to Mr. Wilkinson, one of the trustees and guardians of Mr. Lambton's infant son and devisee, for a renewal of the lease of the premises at Panns, making the application in their own names, without any communication with the plaintiff; with whom it was represented that George Fenwick was determined to have no farther connection in trade, not having at that time apprised him of their intention to dissolve the partnership. An agreement was accordingly executed by them and Wilkinson for a renewal of the lease to them exclusively, for the term of eight years from the 22d of November following. On the 19th of October, 1804, the Fenwicks first informed the plaintiff that they had obtained that renewal, and gave him verbal notice of their intention to dissolve the partnership on the 22d of November following; and on the 15th of November they gave \*him a written notice to that effect. At this time various contracts entered into by Addison Fenwick in the name of the [\*617] partnership with glass manufacturers and other workmen, for long terms of years, were still subsisting; and in May, 1804, he purchased in the partnership name a large quantity of kelp, though the stock then in hand was more than sufficient to last till November. The defendants, the Fenwicks, offered to take the contracts with the workmen off the plaintiff's hands, and to give him an indemnity, or to divide the workmen. They also offered to take the partnership property and utensils at a valuation, and desired the plaintiff, if he would not comply with that proposal, to take his share of the premises; and, the plaintiff refusing, they con-

tinued the business with the partnership machinery, stock of kelp, and workmen.

The plaintiff, having filed the bill, died, and the suit was revived by his representatives. The defendants insisted that the partnership was duly dissolved, that they were only accountable for the value of the partnership property at the time of the dissolution, and that it was not necessary for them to inform the plaintiff of their intention to dissolve the partnership, or to apply for a renewal of the lease; and the questions were, 1st, Whether under the circumstances the partnership was duly dissolved; if it was, 2dly, Whether the defendants were not accountable for the profits derived since by means of the partnership property; 3dly, Whether the renewed lease was not taken in trust for the partnership.

Sir *Samuel Romilly*, Mr. *Bell*, and Mr. *Simpkinson* for the plaintiff.

The business having been carried on, after the expiration of the term fixed by the articles, in the same manner, this court will hold that the original terms were to be observed, and therefore the partnership could not be dissolved without twelve months' notice, according to the original stipulation. Where a partnership concern is carried on after the expiration of the original term, without any new agreement, the conclusion of law is, that it proceeds upon the old footing; as a tenant, continuing the occupation of a farm after the expiration of his term, holds subject [\*618] to all the covenants in the old lease. From the nature of this covenant it could not be determinable at pleasure; and the conduct of the parties, the lease taken of the warehouse in London, the contracts with the workmen, and the purchase of the additional stock of kelp, show that it was not so considered. The notice of dissolution, therefore, is not sufficient.

Mr. *Hart*, Mr. *Leach*, and Mr. *Wear*, for the defendants.

If the partnership had originally commenced without articles it might have been dissolved at a moment's notice; and the same rule prevails, where, after the expiration of the period originally stipulated, the business is by mutual consent continued. That rule which, whatever may have been held formerly, is now settled by the late case of *Peacock v. Peacock*, 16 Vesey, 49, was adopted to obviate the inconvenience resulting from the question, What is reasonable notice? and to prevent endless litigation; as that question in each particular case must have produced a suit. The clause in these articles can apply only to the limited term. It is merely an enabling clause, empowering any of the partners to retire during the continuance of the term. The case of a tenant holding over after the expiration of his term has no analogy; and in that instance, if the lease had contained a clause for determining it at twelve months' notice, yet, after the expiration of the term, the tenant continuing in possession as tenant from year to year, six months' notice would be sufficient. The general rule cannot give way to the inconvenience of the particular case, from the quantity of kelp laid in, the contracts with the workmen, and the lease of the warehouse. The argument upon those circumstances proves too much, viz., that the partnership must continue during the whole period of these contracts; if, for instance, a

lease had been taken for ninety-nine years, the partnership must have had the same duration.

Sir *Samuel Romilly* in reply.

With regard to the question of dissolution, though in *Peacock v. Peacock*, 16 Vesey, 49, it was decided, that a partnership for an indefinite time may be dissolved immediately, great doubt had prevailed upon that point previously, and that case had no special circumstances. The lease being renewed, (if that agreement \*is to be considered as obtained [\*619] in trust,) and these workmen being hired for considerable periods, during which the partners were bound by articles to employ them, how can those contracts be avoided? The proposal to the plaintiff upon that subject was unfair, and their mode of treating him was perfectly unauthorized. Their conduct led him to conclude that the concern was to proceed as it had been previously carried on. A short time before they had purchased a large quantity of materials for this manufacture, which could not have been worked up within the limits of the subsisting term. What would be the conclusion of a jury upon this proposal, that the plaintiff, being indemnified against the contracts, should take his proportion of the workmen and materials, and seek a place for establishing another manufactory, they remaining on the spot with all the rest; and by their clandestine agreement gaining this great advantage, securing to themselves the whole of the good-will? Though the distinction as to notice between partnership for definite and indefinite periods must be admitted, the provision by the original articles requiring a year's notice even to enable one to withdraw, shows the judgment of the parties, that the engagements of the concern would demand a considerable time to bring them to a conclusion, and must be taken as the construction of their intention in the event of a total dissolution, which the existence of these contracts must therefore preclude without at least the same notice.

The MASTER of the ROLLS.

The first question in this cause is, Whether the partnership was dissolved on the 22d of November, 1804? The plaintiff contends, that the defendants had no right to put an end to the partnership at that period; and that is contended on several grounds; 1st, that, as by the articles which formerly existed, but had expired, twelve months' notice was necessary to enable a partner to withdraw, the same notice was necessary for withdrawing from the partnership, which continued without articles. I do not agree to that proposition. The latter partnership was for an indefinite period, and therefore might be dissolved at the will of the parties, subject to the question afterwards made, by what notice that will must be declared.

\*Another ground, on which the plaintiff contends against the dissolution on the 22d of November, is, that the lease of the premises in London, used in carrying on the concern, was then unexpired. That does not oppose any obstacle to the dissolution, as it is not a necessary consequence that partners taking premises for the use of their trade for a definite period contract a partnership for the same period. If any part of the term is unexpired at the end of the partnership, that is

partnership property, and is to be distributed as such; but I do not apprehend that they are bound to continue the partnership on that account.

A third ground is, that there were several contracts subsisting with their workmen, which had a considerable period of time to run. That argument goes considerably too far. It would go to this extent, that a partnership could not be dissolved until all their contracts were completely ended and wound up, and that can hardly be the case at any period, as persons are entering into contracts from day to day which cannot all expire at the same period. It would on that ground be hardly possible to dissolve any partnership, as there must always be contracts depending. I do not conceive, therefore, that the existence of engagements with third persons, either for goods to be worked up, or engagements with their workmen, which had not come to a conclusion, can form an objection to the dissolution. The partners cannot, it is true, by a dissolution relieve themselves from the performance of any engagements which they may have contracted with third persons; but, as among themselves, the existence of such engagements cannot prevent a dissolution either by mutual consent or by notice.

The question then is, what sort of notice ought to be given for this purpose? Until a very recent period it had been, I believe, understood, that a reasonable notice should be given; but upon the question, what is reasonable notice, much difference of opinion may prevail. On the one hand, it may be extremely disadvantageous to parties to say, that a partnership shall be dissolved on a given day; on the other, it must be extremely difficult for a court of equity, by a general rule, to ascertain, [\*621] what is reasonable notice? and the question, whether \*the particular notice was reasonable or convenient would be the subject of discussion in almost every instance of the dissolution of a partnership. Considerations of that sort, I believe, have led to a different rule; that in the case of a partnership such as this, subsisting without articles, and for an indefinite period, any partner may say, "It is my pleasure on this day to dissolve the partnership;" but, considering the principles on which the dissolution must take place, a partner can very seldom, if ever, have an interest to give notice of dissolution at a period disadvantageous to the general interests of the concern; as where the articles do not prescribe the terms the law ascertains what shall be the consequence of dissolution, viz., that the whole of the joint property must be sold off, and the whole concern wound up. No partner, therefore, can derive a particular advantage by choosing an unseasonable moment for dissolution; as upon the principles established in *Crawshay v. Collins*, and the authorities there referred to, he must suffer in proportion to the extent of his interest in the trade. I hold, therefore, that the dissolution of this partnership took place on the 22d of November.

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1. In certain cases a dissolution of partnership may be decreed by a Court of Equity before the expiry of the term for which it was originally entered into, as,



for instance, where one of the co-partners has been guilty of fraud, or of rash and reckless speculation in the conduct of the business of the partnership. But to justify such a dissolution a strong case of positive or imminent abuse must be established as a ground for the interposition of the court. Where, also, one of the partners becomes disabled to act, or where the business of the firm becomes impracticable, a Court of Equity would decree a dissolution of the partnership.

2. Where there is no express stipulation as to the duration of a co-partnership, its intended duration may sometimes be ascertained by implications and presumptions, arising from the acts and conduct of the parties, and other accompanying circumstances. A lease of premises, however, for carrying on the business of a partnership, is not a ground for presuming that there was any implied agreement between the partners, that the duration of the partnership shall be co-extensive with the duration of the lease.

\*WHERE A PARTNER RETIRES, BECOMES BANKRUPT, OR DIES, HE OR HIS CREDITORS, OR REPRESENTATIVES, ARE ENTITLED TO [\*622] THE VALUE OF HIS INTEREST IN THE FIRM, WHICH IS TO BE ASCERTAINED NOT BY A VALUATION, BUT BY SALE; AND IF BEFORE A SETTLEMENT IS MADE THE BUSINESS IS CARRIED ON BY THE REMAINING PARTNERS WITH THE PROPERTY OF THE FIRM, THEY ARE ENTITLED TO A SHARE OF THE PROFITS MADE SUBSEQUENT TO THE DISSOLUTION.

### CRAWSHAY v. COLLINS.

July 26th; 1808.—E. 15 Ves. 218.

In September, 1801, Collins, Noble, and Boughton, entered into partnership in the business of pump and engine manufacturers. In December, 1803, a commission of bankruptcy issued against Noble. In August, 1804, this suit was instituted upon a bill, filed by the assignees under that commission against Collins and Boughton; stating that a patent was granted in 1799 to Noble for a certain apparatus to be applied to the working of pumps, engines, &c.; that another patent was granted in 1800 to the defendant Collins, for improvements in the application of metals or metallic mixtures, as a substitute for iron, in several parts of chain pumps; that the expenses of soliciting the said patents were defrayed out of the said partnership funds of Collins and Co.; that no articles were entered into as to the term or continuance of the partnership, stating the shares and terms upon which they had verbally agreed; that the partnership entered into a contract with the navy board to supply the navy with pumps, &c., determinable on six months' notice, which contract had not been determined, and that, besides the profit made under that contract, they carried on a very extensive business as pump and engine makers, but no account had been settled.

The bill prayed, that the plaintiffs as assignees of Noble, may be declared entitled to three eighth parts of the profits which have arisen, and which shall arise from carrying on the said copartnership business, and which remained unaccounted for to Noble at the time of his bankruptcy,

or have accrued since ; and also to three eighth parts of the said patents, and to all profits and emoluments to arise therefrom ; and that the said [\*623] \*three eighth parts thereof may be sold for the benefit of the bankrupt's estate, on account of all dealings and transactions, &c.

The decree made on the 5th of August, 1805, directed an account of all dealings and transactions in partnership between Noble and the defendants down to the 7th of October, 1803, the time of Noble's bankruptcy ; without prejudice to the question whether the plaintiffs, as assignees of Noble, are entitled to a share of the profits of the partnership-business, subsequent to the 7th of October, 1803. The master's report stated that the defendants and the bankrupt carried on the business of pump and engine makers in partnership, from September, 1801, previous to which time the said business had been carried on by Noble and Collins in partnership with other persons ; that the business was carried on in leasehold premises ; and it was agreed at the commencement of the partnership, that the capital of their trade, consisting of the said leasehold premises, the tools and utensils of the trade, and the money then advanced by the partners severally, should be estimated at £5333, 6s. 8d., of which three eighth parts, being £2000, were to be considered as the share of Collins ; three other eighth parts as the share of Noble ; and the remaining two eighth parts as the share of Boughton. The capital was afterwards reduced by agreement, and the clear profits of the trade to the 7th of October, 1803, were estimated at £3053, 2s. 0½d., of which Noble's share amounted to £1144, 18s. 3¼d. The stock in trade and capital of the partnership on the 7th of October, 1803, consisted of the leasehold premises, where the trade was carried on with the tools, and implements, and goods, manufactured, and unmanufactured, the whole valued at £3053, 8s. 0½d., whereof three eighth parts for the share of Noble, amounted to £1145, 0s. 6d.

The cause came on for farther directions.

Sir *Samuel Romilly*, Mr. *Hart*, and Mr. *Cooke*, for the plaintiffs.

The plaintiffs are entitled to an account of the profits of their capital used and hazarded in the trade carried on by the defendants. The case of *Hill v. Burnham* is a direct authority \*upon the point ; the [\*624] plaintiff married one of the daughters of the testator, by whose death the partnership between him and the defendant was dissolved ; the defendant, who was the executor, having continued to carry on the trade with the same capital, your lordship declared that the testator's trade having been carried on after his death with his capital, the plaintiffs were with his other children entitled to the profits in proportion to the shares they were respectively entitled to in his personal estate. Bankruptcy certainly puts an end to a partnership ; but the consequences would be most mischievous if the solvent partners are at liberty to carry on the trade for their own benefit with the property, and at the risk of the bankrupt. The principle has been acted upon in innumerable cases. In the instance of an executor or trustee, employing the trust money in his trade, the *cestui que trust* has an option to have interest, or the profit made.

Mr. *Alexander*, Mr. *Leach*, and Mr. *Roupell*, for the defendants.

The proposition maintained by this bill is equally contrary to principle, the interests and practice of traders, and the understanding and feelings of mankind, amounting to this: that if one partner becomes bankrupt, and the assignees under his commission are so negligent as not to call for an account, and a sale of his interest, they may afterwards compel the other partners to account for all the subsequent profits of the trade, carried on with labour, capital, and risk. Upon what ground can these assignees be considered partners in this trade,—a manufactory of pumps for ships? The patent, taken out in Noble's name, though with the partnership funds, was never used to any extent; and Noble, who had stipulated to employ his skill, withdrew from the business. The argument with reference to that therefore fails. The assignees were bound to call for an account immediately. That proportion of the capital could not be considered as capital to be employed in the trade of the remaining partners. It was not their capital, employed in any sense. This cannot be compared to the case of executors or trustees. The remaining partners were not trustees for these assignees, but debtors to them, liable to account in equity. \*The ground of a claim of partnership must be either the application of skill,—capital in its proper [\*625] sense,—not a mere debt or liability. These assignees cannot be represented as making themselves personally liable for the adventure, as they might do certainly, but that purpose must be signified.

As to the right to a sale, they could not insist upon a sale of the entirety of the leasehold premises, but only of the undivided interest. Under an execution against one the sheriff seizes the whole, but sells only the undivided interest. As tenants in common, they would be entitled to an account of the produce of the sale of manufactured goods, but not of goods unmanufactured at the time of the bankruptcy, which put an end to the concern, depending upon personal character, skill, &c. In the case of *Hill v. Burnham*, the executor carried on the trade with the stock of the partnership as executor, meaning to do so, and pledging it in his partnership trade. That he could not do. The executor and trustee are answerable for carrying on the trade, as a breach of duty; but these partners have violated no duty. In every instance of a separate bankruptcy the right of the assignees is only an account; and to have a value set upon the specific chattels at the time of the bankruptcy. The claim beyond that to a share of the subsequent profits is made by persons who could pay no personal attention to the trade, and could not be liable to any loss. It never was held that upon the bankruptcy of one partner there must necessarily be a sale of the whole. The consequences would be extremely hard upon the solvent partner, who would thus be removed from his means of livelihood, by no fault of his, and for the sake of the person whose misconduct has produced the embarrassment. The legal effect of the bankruptcy of one partner is a dissolution, the partnership ceases, there is an end of all the joint concern, and as a consequence the assignees are entitled to all the bankrupt's interest in the property at the time of the bankruptcy. This is an attempt to continue the partnership, notwithstanding that legal termination for the benefit of the assignees, without any new contract entitling them to share in the subsequent pro-

fits, and though they incur no hazard. There would be no mutuality, the remaining partners being liable to future losses in their capital, their [\*626] own property, and \*their persons. This is not a trade consisting merely of capital, but a manufactory under a patent; the premises and the stock in themselves unproductive, and rendered productive only by the application of the skill, personal labour, and management of the remaining partners. The inequality, therefore, is enormous, the assignees having incurred no risk beyond the mere original value of the timber, the value of which when worked up may be increased tenfold. The bankruptcy of one partner scarcely ever puts an end to a trade if profitable. The consequences, therefore, of establishing such a principle will be very extensive.

Sir *Samuel Romilly*, in reply.

The principle upon which this relief is sought has been acted upon in many cases,—not cases of executors, as *Hill v. Burnham* was, the question of law being considered as clearly decided. In the late case of *Brown v. Vidler*, a partnership for a term of years in the manufacture of the mail coaches, to continue by the contract for the benefit of executors, the plaintiff, claiming under a deceased partner, having been prevailed upon by the defendant to give up her share for an inadequate consideration, filed the bill to set aside that transaction. Before the cause was heard the term expired; and the transaction being set aside by a decree at the rolls, your lordship was afterwards of opinion that the plaintiff was entitled to a share of all the profits made after the expiration of the term, including the benefit of the contract with government made by the defendant alone.

In another late case, *Coxwell v. Bromet*, upon a bill for an account and injunction, upon disputes between three persons engaged as chemists in partnership for an indefinite term, the defendant insisted upon an agreement for a dissolution of the partnership as to Buckley, one of the partners; he died, and a bill of revivor was filed by his representative; your lordship held that there was no dissolution; it was then contended that at least there should be no account beyond the death of Buckley, that operating as a dissolution; your lordship did not determine that point, but intimated a strong opinion that the account subsequent to the death was due.

[\*627] \*This is not modern doctrine. In the case of *Brown v. Litton*, 1 P. Will. 140, Lord Harcourt expressly declares his opinion, 1 P. Will. 141, that if one of two joint traders dies, and the survivor carries on the trade after the death of the partner, the survivor shall answer for the gain made by this trade, to the same effect as your lordship's decision in *Hill v. Burnham*, without the circumstance, which can make no difference, that the surviving partner was the executor. In that case the executor is under peculiar hardship. He cannot settle with himself, and therefore cannot, as another partner may, having settled it, buy the property himself. There is another modern case, *Hammond v. Douglas*, 5 Vesey, 539, an express determination of this point, not in the case of an executor, but against a surviving partner claiming profits made after the death of the other. The other point

determined in that case, that the good-will survived is certainly very doubtful. It is difficult to see how the good-will, consisting in the habit of the trade being carried on in the same place can be distinguished, and separated from the lease of the house.

In these cases the court has never proceeded upon the ground that this is misconduct, but considers the profits as an accession to the capital, arising out of it, belonging to the proprietor as much as an increase of slaves in the West Indies, or of any stock in this country. If one partner of a ship without consent, or with the express dissent of the other, charter her, though there is a proceeding in the Admiralty Court, by which he may in that case have liberty to do it alone, yet, if he has not taken that course, the other is entitled to a share of the profits; *Strelly v. Winson*, 1 Vern. 297, and the cases referred to by Mr. Raithby. In *Skipp v. Harwood*, *West v. Skip.*, 1 Ves. 239, 456, Lord Hardwicke held, upon the claim of lien by Skipp, that no distinction was to be taken between the stock actually existing at the dissolution of the partnership, and that which was afterwards acquired by the continuation of the business; the lien attaching equally upon stock which came in the course of trade in the place of that which existed at the time of the bankruptcy. There is no ground for the objection that the account should have been called for sooner. The bankruptcy occurred in 1803, and the bill was filed in 1804. \*The assignees after filing the bill would have been liable personally for losses, and they could take no other [\*628] step in order to entitle themselves to a share of the profits. The habit of the court has been to make an allowance to the solvent partners for their skill and exertions, and upon that point the defendants may have a reference.

The LORD CHANCELLOR.—I cannot adopt the principle upon which this case has been put for the defendants; depending upon what is conceived to be the understanding, feelings, and interests of traders, and of mankind upon this subject. I must act upon the law as it is understood in this court, however inconsistent it may be with those interests and feelings. If my opinion was that in no possible circumstances any account of the profits is to be given, that would dispose of the case against the plaintiffs; but if there is a possible case in which they may have a claim to profits, though there may be many other cases in which they cannot claim, yet upon this record I have no intimation whatsoever how the profits, if any, have been made; by what application of the funds stated in the report, either alone, or combined with other funds, any and what profits have been made, no information is given. The profit may have been made by one simple sale and conversion of the capital existing at the time of the bankruptcy. Nothing is stated of debts due to the trade, or advances by these parties, whether from their private funds, or from the conversion of the stock.

Partnerships are regulated either by the express contract, or by the contract implied by law from the relation of the parties. The duties and obligations arising from that relation are regulated, as far as they are touched, by the express contract; if it does not reach all those duties and obligations, they are implied and enforced by the law. In the in-  
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stance of a partnership without articles, the respective proportions of capital contributed by the partners, and the trade being carried on either for a certain period, or the connexion dissolvable at pleasure, the time being expired, or in the other case notice to determine being given, it cannot be contended, that if the remaining partners choose to carry on the trade, they can consider the whole property as their own, to be taken [\*629] at such valuation as \*they think proper to put upon it. That is not the law. The obligation implied among partners is, that they are to use the joint property for the benefit of all whose property it is.

Many complicated cases may arise. There may be a partnership where, whether the parties have agreed for the determination of it at a particular period or not, engagements must, from the nature of it, be contracted, which cannot be fulfilled during the existence of the partnership; and the consequence is, that for the purpose of making good those engagements with third persons it must continue; and then, instead of being as it was a general partnership, it is a general partnership, determined, except as it still subsists for the purpose only of winding up the concerns. Another mode of determination is, not by effluxion of time, but by the death of one partner, in which case the law says that the property survives to the others. It survives as to the legal title in many cases, but not as to the beneficial interest. The question then is, whether the surviving partners, instead of settling the account, and agreeing with the executor as to the terms upon which his beneficial interest in the stock is still to be continued, subject still to the possible loss, can take the whole property, do what they please, and compel the executor to take the calculated value. That cannot be without a contract for it with the testator. The executor has a right to have the value ascertained in the way in which it can be best ascertained, by sale.

If the implied obligation is, that partners are to use the property for the benefit of those whose property it is, where is the hardship? I concur therefore with the judgment of Lord Rosslyn upon that point in the case of *Hammond v. Douglas*, 5 Ves. 539, though I agree with the doubt expressed by Sir Samuel Romilly upon the other point there determined, that the good-will survives. If the surviving partners think proper to make that which is in equity the joint property of the deceased and them, the foundation and plant of increased profit, if they do not think proper to settle with the executor, and put an end to the concern, they must be understood to proceed upon the principle which regulated the property before the death of their partner; and I cannot see, if there had been no speciality in the case of *Brown v. Vidler*, why that decision, [\*630] if \*it proceeded upon those principles, would not have been just. The deed by which the plaintiff had assigned her share to the defendant being set aside, from that moment she became a partner. If that partnership, determined by effluxion of time, and without a new agreement the trade was carried on with the property that was embarked in it, they are supposed to go on upon the old footing; and whether the patent, or the contracts with government had or had not expired, if from that property in the view of this court the property of both, a profit was

derived after the expiration of those periods, the equity may be fairly said to reach that case.

As to the case now before the court of the bankruptcy of one partner, supposing it the simple case of profit made by the mere sale of the property, there must be an account. It is said a duty was imposed upon the assignees to call for the account. That is true. It is further urged that they could not be traders in new adventures. That also is in a sense true; but the proposition would be rash that there can be no case in which they could trade with consent of the creditors, or of the creditors and the bankrupt together. If they had the consent of all persons interested, I do not know that other persons with whom they might deal could make the objection. The duty is not as between them and the other persons, who are not properly to be termed remaining or surviving partners; the destruction of one being, unless it is otherwise provided, a dissolution of the whole partnership, as if by effluxion of time, or by death, except as it may be reasoned upon the effect in bankruptcy of the substitution of assignees. It is, however, no more the duty of the assignees to settle with the others than it is their duty to settle with the assignees.

Is it possible then to say, that upon any rule of law the other partners can take, as sole owners, all the houses, buildings, and stock in trade? The consequence of the destruction and dissolution of the partnership is that they became tenants in common in each and every article embarked in it, under an obligation to deal with the whole of the stock, and every article, as the equitable title of the bankrupt and themselves requires; and according to the case of *Fox v. Hanbury*, Cowp. 445, the right is, not to an individual proportion of a specific article, but \*to an account; the property to be made the most of, and divided. The [\*631] question then is, whether the other partners have a right to carry on the trade, become theirs exclusively, with the property belonging to the former partner, considering the profit as exclusively their own, and in that concern unquestionably hazarding the loss of that property, if not implicating personal responsibility, indisputably in the course of that trade exposing that property to hazard. It is contended by the defendants, that if they dealt only with this property, receiving the money, and turning it, as they do in trade, the demand is only to the extent of a third of the money made by the first sale. That would give the right to an account to that extent; but there may be a more complicated case, upon the application of funds of their own, mixed with the partnership property. How far the principle is applicable to the case of persons so mixing and applying property of their own, is a consideration with which I should deal at much hazard, when not apprised of the actual circumstances of the case now before me.

I cannot go the length of holding that there may not have been profits in which these assignees are not entitled to participate. I will not say that they have a right to participate in all the profits that have been made. I shall therefore direct an inquiry, to ascertain whether the profits that have been made were made by any, and what application of the funds, which the report states, as constituting the capital in October, 1803; or by the application of any other, and what funds; and with a

direction to the master to state the circumstances, with reference to profit made by the contract with government. My present notion, without prejudice, is that the defendants have a right to put it to the plaintiffs to take to that contract, or to decline it; but if they choose to take to it the others cannot prevent them.

The decree accordingly directed an inquiry whether there were any and what profits made since the 7th of October, 1803, by any and what use or application of, or by means of, the stock in trade and capital of the partnership business, as the master finds the same to have been constituted, with liberty to state \*specially any circumstances relative to the stock and capital existing on the 7th of October, 1803, or as to any profit made since, or as to any contract with government, or as to the patents, or any profits made from such contracts, or by the use of the said patents.

WHERE AN OSTENSIBLE PARTNER RETIRES, NOTICE OF THE DISSOLUTION MUST BE GIVEN TO ALL PARTIES WHO HAD PREVIOUS DEALINGS WITH THE FIRM; BUT A NOTICE IN THE GAZETTE WILL BE SUFFICIENT IN REGARD TO PARTIES SUBSEQUENTLY CONTRACTING WHO HAD NO PREVIOUS DEALINGS WITH THE FIRM.

### GODFREY v. TURNBULL.

July 4, 1795.—E. 1 Esp. 371.

THIS was an action by the plaintiff as indorsee of a promissory note, against the defendants, as the makers of it.

The defendants had been partners in trade, but the partnership had been dissolved prior to the date of the note.

Macauley, one of the defendants, suffered judgment to go by default.\*

The other defendant relied that the note was made by the defendant Macauley only, after the dissolution of the partnership, who had put their joint names on it without any authority from him.

The note was dated the 6th of April, 1793. On the 19th of the March preceding, notice of the dissolution of the partnership, dated the 15th, had appeared in the gazette.

The question was, whether the notice given in the gazette was sufficient so as to exonerate the defendant Turnbull.

Lord KENYON.—In general, if a partner gives a note in the partnership name, all the partners are bound by it; and that is the case even if given after the actual dissolution of the partnership, if that was not sufficiently notified, and the party who took the note took it on the faith of the partnership name.

A secret dissolution of a partnership cannot discharge the [\*633] \*partners; but if the dissolution is notified in the ordinary and usual way, as it is the only mode by which the fact of the dissolution can be promulgated to the world, at least to those who have had no pre-



vious dealing with the partners, it seems sufficient at least to be left to the jury, from thence to infer notice.

In many cases, notice in the gazette is sufficient to subject a party to penalties, as in the cases of smuggling and outlawries. So in the cases of bankrupts, notice in the gazette is sufficient for every purpose. In the present instance, there is no proof of any actual notice to Mr. Godfrey the plaintiff, but the publication in the gazette is proved, antecedent to his taking the note.

The jury are to judge from the practice in the usual course and ordinary mode of business. Notices are to be found in every gazette of the dissolution of partnerships, which seems to point out that as the mode adopted by the world for notifications of this sort, and therefore every prudent man in business ought to consult them.

The jury found a verdict for the defendant Turnbull.

1. In *Graham v. Hope, Peake*, R. 155, Lord KENYON observed,—“The gazette was not of itself sufficient notice to the plaintiff of the dissolution of the partnership. I do not say this for the purpose of this cause merely, but I mean to lay it down as a general rule to govern the conduct of all men. Many people there are in this kingdom who never see a gazette to the day of their deaths, and very mischievous would be the consequences if they were bound by a notice inserted in it. It is incumbent on persons dissolving a partnership to send notice of such a dissolution to all persons with whom they have had dealings in partnership.”

2. Where a retiring partner has taken the proper steps for publishing his retirement, he will not be liable to parties ignorant of the dissolution of the firm on account of obligation undertaken by the remaining partners under the old name of the firm. The case of *\*Newsome v. Coles*, 2 Camp. 617, was [\*634] an action against the defendants as acceptors of a bill of exchange under the firm of Thomas Coles and Sons. Thomas Coles and his three sons the defendants, formerly carried on business under that firm. “The father died in 1805, and the three sons continued to carry on business under the same firm until the year 1808. George and Charles then withdrew, and established a new business under a new firm. Notice of the dissolution of partnership was published in the London Gazette, and was sent round to the correspondents of the house. William Coles continued the old business by himself, under the old firm, and accepted the bill in question, drawn upon Messrs. Thomas Coles and Sons. The plaintiff had not had any dealings with the partnership of ‘Thomas Coles and Sons,’ when composed of the three brothers; and when he took the bill in question he did not know that that partnership had been dissolved. The attorney-general contended that George and Charles Coles were liable to him as partners with their brother William. They must be taken to have authorized him still to hold them out as partners to the world. If they consented to the old firm being used by him, they were clearly liable as much as if the names of both had been mentioned by their authority, and their consent must be presumed from their never having attempted to prevent him from using the old firm. Had they applied to the great seal, as it was their duty to do, the chancellor would at once have granted an injunction against one partner drawing or accepting bills in the partnership firm after a dissolution of the partnership. Lord ELLENBOROUGH.—It is not pretended that the defendants George or Charles Coles ever interfered with the business carried on by William after the dissolution of the partnership, or by any act whatsoever authorized him to use the firm under which they had traded together. I am therefore of opinion that they are not liable for that firm being used by him without their authority. Ample notice had been given of the dissolution of the partnership; and after that, it

was the duty of persons taking securities in the name of Thomas Coles and Sons, to inquire who were designated by that firm. The plaintiff might not know of the dissolution, but he had the means of knowing, and the partners who retired could not remain liable for his ignorance. I think they were not bound to apply to the lord chancellor for an injunction, or to take any notice of the firm which their brother might happen to use. They were discharged from all liability for his acts by the dissolution of the partnership, and the notice which was communicated of that event. The plaintiff must be called."

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[\*635] \*IN ENGLAND WHERE A DORMANT PARTNER RETIRES HE IS NOT LIABLE FOR THE SUBSEQUENT OBLIGATIONS OF THE FIRM, EVEN ALTHOUGH NOTICE WAS NOT GIVEN TO PARTIES DEALING WITH THE FIRM, UNLESS THE FACT OF HIS BEING A PARTNER WAS KNOWN TO THE PARTY CONTRACTING, IN WHICH CASE NOTICE TO SUCH PARTY WOULD BE NECESSARY.

### CARTER v. WHALLEY.

June 15, 1830.—E. 1 Bar. & Ald. 11.

ASSUMPSIT by the indorsee against the defendants as acceptors of a bill of exchange. Plea by Whalley, the general issue; judgment by default against the other defendants. The bill, dated Birmingham, May, 16, 1829, was drawn by Jackson upon "The Plas Madoc Colliery Company, near Ruabon, North Wales," payable to Jackson's order; accepted, per procuracion, by Veysey for the company, and indorsed by Jackson to the plaintiff. At the trial before Lord Tenterden, C. J., at the London sittings after Easter Term, 1830, it was proved that Carter, a person residing at Birmingham, had discounted the bill for the Plas Madoc Colliery Company at the request of Jackson, who managed their pecuniary affairs, and who remitted the proceeds of the bill to them in Wales. The company, some time before this transaction, consisted of the four defendants, but in April, 1829, Saunders withdrew from the partnership. It did not appear that any notice of this fact had been given to the public or to Carter. There was no proof of any dealing between Carter and the firm before May, 1829, when the bill was drawn. For a short time in 1828, the company had an account at the Wrexham Bank in North Wales, and Saunders was known there as one of the partners. He had been seen at the colliery in April, 1828, taking some part in the getting up of a steam-engine. Jackson lived at Birmingham; and an attorney who witnessed the instrument by which Saunders made over his share in the partnership, and who knew all the defendants at that time; also resided there. The plaintiff had stated in December, 1829, that he did not know the defendant Whalley at the time when the bill was drawn. [\*636] \*On this evidence Lord Tenterden was of opinion that the action was not sustained, Saunders having withdrawn from the firm before the acceptance was given; and that the plaintiff could not avail himself of the want of notice, as it did not appear that he had ever dealt with the company while Saunders was a member, or that the

partnership during that time had been so known at Birmingham, where the plaintiff carried on business, that he must be supposed to have looked upon Saunders as a partner, in default of notice to the contrary. The plaintiff was therefore nonsuited.

*Campbell* now moved for a rule to show cause why the nonsuit should not be set aside and a new trial had. The plaintiff was entitled to consider Saunders as one of the acceptors, having had no notice of his withdrawing from the firm. *Evans v. Drummond*, 4 Esp. N. P. C. 89, may appear an authority to the contrary; but that was the case of a dormant partner. Where the partner has been ostensibly such and retires, there must be notice of that fact, to exempt him from future liability. *Par-kin v. Carruthers*, 3 Esp. N. P. C. 248. In that case the plaintiff was not proved to have had any dealing with the firm as at first constituted; and *Le Blanc, J.*, laid it down as a clear rule of law that where there is a partnership of any number of persons, if any change is made in the partnership, and no notice is given, any person dealing with the partnership, either before or after such change, has a right to call upon all the parties who first composed the firm. Here no notice whatever was given, though Saunders had been known as a partner during the continuance of the partnership.

*LORD TENTERDEN, C. J.*, read over the evidence, and re-stated the opinion expressed by him at the trial.

*LITTTLEDALE, J.*—It was incumbent on the plaintiff in this action to prove a contract between the parties whom he named as acceptors, and himself as indorsee. If they were all partners when the acceptance was given by Veysey, that contract is established. But it appears that they had ceased to be so, Saunders having withdrawn. Then it is said that the defendant \*ought to have proved some notice received by the plaintiff of this separation; and it is true that if the plaintiff at [\*637] any previous time knew Saunders to be one of the partners, such notice ought to have been shown. Now, where all the names in a firm appear, it may be presumed that every one knows who the partners are; but where there is only a nominal firm, as in the present case, the fact of such knowledge must be ascertained by express proof. No proof of that kind appears here; and I therefore think that no contract was established between the plaintiff and Saunders.

*PARKE, J.*—The plaintiff was bound to show an acceptance by four parties; that is, that Veysey, who did accept the bill, was authorized to do so by the three others named in the declaration. Saunders had given no direct authority,—he was not a partner at the time. But he may by his conduct have represented himself as one, and induced the plaintiff to give him credit as such, and so be liable to the plaintiff. Such would have been the case if he had done business with the plaintiff before as a member of a firm, or had so publicly appeared as a partner as to satisfy a jury that the plaintiff must have believed him to be such; and if he had suffered the plaintiff to continue in and act upon that belief, by omitting to give notice of his having ceased to be a partner, after he really had ceased, he would be responsible for the consequences of his original representation, uncontradicted by a subsequent notice. But in order to

render him liable on this ground, it is necessary that he should have been known as a member of the firm to the plaintiffs, either by direct transactions, or public notoriety. In the present instance that was not so. The name of the company gave no information as to the parties composing it, and the plaintiff did not show that Saunders had dealt with him in the character of a partner, or had held himself out so publicly to be one, as that the plaintiff must have known it. Carter the plaintiff lived at Birmingham; it should have appeared that there had been such a dealing at that place by Saunders, or that his connexion with the company had been so generally known there, that a knowledge of it by Carter must have \*been presumed. There having been no evidence [\*638] for the jury on these points, I think the nonsuit was right.

Rule refused.

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The case of *Evans v. Drummond*, 4 Esp. 89, was an action to recover the value of a large quantity of hops. "The plaintiff produced the articles of partnership, dated in the year 1787, between the defendant Combrune and one Bell, for carrying on the business of brewers; and, by a clause in that deed, the particular attendance and attention of Drummond to the business was to be dispensed with, so that he was virtually but a dormant partner. In 1792, Bell quitted the partnership. Erskine, for the defendant, stated his defence to be, that the demand of Evans, the plaintiff in this action, commenced on the 5th of October, 1799, and ended in the October following of the year 1800: That, in fact, the defendant Drummond had actually quitted all concern with the partnership on the 10th of March, 1796; so that, at the time of the goods being furnished, he had no manner of concern with it. He then contended that, as Drummond was a partner never visible in the concern, that it was not necessary to give public notice of the time when he ceased to be actually so; but that he was not chargeable from the time when the partnership was put an end to. Lord KENYON asked, if Drummond, the defendant, was ever known to be a partner? He added, that it was incumbent on the plaintiff to show that Drummond was ever known publicly in the partnership; as there must be some publicity of his situation, to which the plaintiff might be presumed to trust, otherwise he could only be charged during the time he was actually a partner, and was receiving the emoluments and profits of the business."

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[\*639] \*IN SCOTLAND IT HAS BEEN HELD THAT NOTICE OF THE DISSOLUTION OF A PARTNERSHIP MUST BE GIVEN TO THE PARTIES DEALING WITH THE FIRM IN THE CASE OF A DORMANT, AS WELL AS IN THE CASE OF AN OSTENSIBLE PARTNER.

### HAY v. MAIR.

Jan. 27, 1809.—S. F. D. 102.

ALEXANDER POLLOCK, merchant in Glasgow, addressed the following missive to Alexander Adamson:—

"SIR,—As I understand you are going to New York, or some other State of America, in order to do business in the merchant line, and more especially to sell goods of the manufacture of this country, I shall therefore, at this time and every other opportunity, ship you goods to any moderate amount; that is to say, if you make me such remittances as may be necessary, in enabling me to ship not only goods of my own manufacture, but to purchase others that may answer the markets you may hereafter acquaint; and I agree to run you one-half gainers and half losers in all goods I ship you out, and to allow you a salary of £60 per year, to defray your own expense; and whole other necessary expense comes in the trade, such as carriage, freight, duty, postages, &c., is to be deducted off the whole head. And it is to be understood, that every year you set off, and give me a state of accounts or goods sold, whether the trade is likely to do good or bad. This bargain or agreement to continue four years from and after this date, provided the said business be productive of any profits, so as to enable the same to be carried on; but if any of us should alter our mind before the said term of four years should expire, we bind ourselves to give each other notice. In the meantime, I remain," &c.

Adamson accepted of this offer by a counter missive; and in terms thereof Adamson for some years acted in New York, and Pollock in Glasgow.

Clear evidence from the correspondence of the parties was produced, by which it appeared that the transactions of the copartnery were extended to goods ordered from England by \*Adamson, and were not limited to those transmitted by Pollock. [\*640]

The parties afterwards determined that the agreement in this missive should be dissolved; that the transactions under it should be wound up; and that Adamson should be entitled to all the profits, and take upon himself all the debts thence arising. Adamson being at this time in Glasgow, the parties subscribed the following missive:—"We the subscribers, considering that in July, 1795, we proposed to be engaged in joint adventures of merchandise, as expressed in the prefixed missive, and that certain transactions took place in consequence thereof betwixt us; but having now stated and settled our accounts, as if no such proposal had ever been made, and not being inclined to continue business in the terms there proposed, judging it better for our several interests that any future transactions of buying we eventually have with each other, should be done betwixt us as with any other trade, we do hereby pass from and relinquish the proposed agreement, as expressed in the foregoing missives, and discharge all claims competent to each of us against the other in consequence thereof. In testimony whereof," &c.

No public notification was made of this dissolution; and Adamson again departed to America.

In the year 1801, Adamson returned to Scotland, and became bankrupt, was sequestrated, and David Kay was appointed trustee.

Kay then raised an action against Pollock, setting forth, "That the said Alexander Pollock, being the partner of the said Alexander Adamson, in trade and business carried on by him, and never having been

publicly separated from him, is liable to the whole creditors of the said Alexander Adamson in the debts due to them respectively."

In defence, Alexander Pollock pleaded, that he could not be liable for the debts of this copartnery, in so far as incurred subsequently to the date of the private dissolution of it. In the copartnery of joint trade into which the defender had entered, he was a latent partner. No social [\*641] firm was used, nor did his \*name at any time appear to the public. No one, therefore, was deluded to contract on the faith of his credit. As, therefore, the defendant's connexion in trade with Adamson was latent, the dissolution of that connexion did not require publication; 29th November, 1774, *Armour v. Gibson*.

The pursuer pleaded, that it was a general principle of law, well understood and firmly established, that in all cases where a copartnership has existed, the dissolution of it must be published, either by special notification, or by some other act equivalent to notification. The public must be warned that the credit on which they have hitherto contracted has undergone a change, and that in their future dealings they are not to rely on the past credit of the copartnery. It is not necessary that the names of the partners should be publicly known, or should appear in firm, or indeed that there should be any social firm at all to infer responsibility to this extent in all who have been partners in the company. All the partners, public or latent, active or dormant, co-operate to create a fund of credit on which the public are induced to contract; and having thus acquired a certain character with the public, a *jus quæsitum* arises to the public to be informed that the circumstances are changed, and that those contracting must inquire again into the foundation on which the credit of the new copartnery rests.

The interlocutor of the lord ordinary, (17th June, 1806,) was: "Finds sufficient evidence that a copartnership was constituted betwixt the defender Alexander Pollock, a manufacturer at Anderston, and Alexander Adamson, who, by agreement, was to reside in New York for the purchasing of goods manufactured in this country, to be sent out to New York, and sold there for their joint behoof: Finds, that although by the defender's letter of the 15th July, 1795, he agreed to send out goods of his own manufacture, and to purchase others to be sent out, the transactions of the copartnery were not understood to be limited to such goods as the defender sent out; and that the transactions of the copartnery were extended, and authorized by the defender to be extended to goods ordered by Adamson, the American partner from England: Finds, that [\*642] \*by the agreement of parties, this copartnership was to subsist for four years: Finds, that in 1798 the defender and Adamson agreed to put an end to this joint copartnership, but that there is no evidence of any notification thereof to the public, or to those transacting with Adamson: Finds, therefore, that the defender is liable as a copartner with Alexander Adamson, for such debts and transactions as fell within the scope of this copartnery; and, therefore, before farther answer, appoints the pursuer to condescend upon such particular debts and transactions as he contends the defender is liable to pay and fulfil."

The cause then came before the court by petition and answers; and

from the correspondence produced, it appeared to the satisfaction of the court, that Pollock was not a latent and dormant partner, but had conducted himself as a public and active member of the copartnership.

But in deciding the cause the judges concurred in observing, that the principle laid down in the interlocutor of the lord ordinary was established in the law of Scotland; that where a fund of trade and credit has been created by the copartnership of a set of individuals, and vested in a certain firm with which the public have been accustomed to deal and contract, a published notification of dissolution, or some public act equivalent to this, was necessary to relieve the partners from being responsible for those debts which might be incurred in the name and within the scope of the firm. That a private dissolution did not extend farther than to regulate the private interests of the respective partners. That this general rule of law must be observed in all cases, whether the partners were active or sleeping, and whether their names appeared in the social firm, or whether the social firm consisted only of one name; and that the case of *Armour v. Gibson*, 29th November, 1774, had for a long time been considered to be erroneously decided, and could no longer be regarded as a precedent.

The interlocutor of court (20th December, 1808,) was, Adhere to the interlocutor of the lord ordinary reclaimed against.

And (27th January, 1809,) a reclaiming petition was refused without answers.

\*THE CUSTOMER OF A BANKING FIRM MAY PROCEED AGAINST THE ESTATE OF A DECEASED PARTNER FOR SUCH DEBT AS WAS DUE AT THE TIME OF HIS DEATH, IN SO FAR AS NOT REDUCED BY PAYMENTS MADE BY THE SURVIVING PARTNERS AFTER THAT DATE, AND SUBSEQUENT DEALINGS BY THE CUSTOMER WITH THE SURVIVING PARTNERS WILL NOT HAVE THE EFFECT OF CREATING A NOVATIO DEBITI, AND THEREBY RELIEVING THE ESTATE OF THE DECEASED PARTNER; BUT IN THE ABSENCE OF EXPRESS DECLARATION, PAYMENTS MADE BY THE CUSTOMER AFTER THE DEATH OF THE PARTNER WILL BE APPROPRIATED TO THE EXTINCTION OF PREVIOUS DRAFTS IN THE ORDER OF PRIORITY. [\*643]

### DEVAYNES v. NOBLE.

July 30, 1816.—E. 1 Merivale, 530. Sleech's Case.

By decree made, March 2, 1812, it was referred to the master, in the second cause, to take an account of what was due at the death of William Devaynes, deceased, from the partnership of the said William Devaynes, John Dawes, William Noble, R. H. Croft, and Richard Barwick, to the plaintiffs, and all such other persons as were creditors of the partnership

at the time of the death of Devaynes, and also of what was due, at the time of making the decree, from the partnership to such creditors; and to inquire whether such creditors, or any and which of them, continued to deal with the surviving partners after the death of Devaynes, and what sums of money were paid by the surviving partners to such creditors respectively, from the death of Devaynes to the bankruptcy, and what had since been received by them respectively; and also, whether such creditors, or any and which of them, had, by such subsequent dealings, released the estate of Devaynes from the payment of their respective debts, or what (if anything) remained due in respect thereof. And it was ordered that, in making such inquiries, the master should state to the court any special circumstances.

Under this decree, the master made his separate report, dated the 15th of March, 1815, whereby he found that, in respect of the amount of many of the debts claimed to have been due from the partnership at the death of Devaynes; and in respect of that part of the decree by which [\*644] he was directed \*to inquire whether the creditors, or any and which of them, had by their subsequent dealings released the estate of Devaynes; and also, in respect of the special circumstances material to that inquiry, there were several general questions of equitable principle, upon the decision of which the liability of the separate estate of Devaynes to a great part of the debts would depend; and that, in respect of the said general questions, the said claims were capable of being reduced to a few different classes; so that the decision of one case in each class would virtually dispose of all the rest; but, as he conceived some of the questions to be of considerable difficulty, and that if he should form an erroneous opinion thereon for the purpose of a general report upon the matters in reference, it might subject many of the claimants to further investigation, productive of useless expense and delay; he had thought it right, in the first instance, to select a leading claim of each class, and submit them to the consideration of the court in a separate report; and he had therefore selected from the claims so brought in, the several claims of E. B. Sleech, spinster; Sir John Palmer, Bart.; Nathaniel Clayton, Esq.; Ann Johnes, spinster; the plaintiff, Sir Thomas Baring, (as executor of John Wigglesworth, deceased;) John Warde, Esq.; Jane Brice, widow; and Robert Houlton, Esq.; and in respect of such selected claims, the master reported the following facts, as stated and proved, or admitted before him:—

The said William Devaynes, deceased, for many years prior to, and until the time of his death, carried on business as a banker in partnership with Dawes, Noble, Croft, and Barwick, under the firm of Devaynes, Dawes, Noble, and Co.; and died on the 29th of November, 1809, seised and possessed of a considerable real and personal estate, leaving William Devaynes, (plaintiff in the first cause, and defendant in the second,) his son and heir-at-law; having first made his will, and thereby devised and bequeathed his said real and personal estate to the defendants, Noble, Cockerell, and Booth, (whom he also appointed executors,) upon trust, after payment of certain annuities, and of his debts and legacies, for his son, the said William Devaynes, at twenty-seven, and for his issue in the



\*manner therein mentioned; and the testator thereby directed that, in case it should be agreed after his death to admit his said son an equal partner in the banking-house, his trustees should advance £10,000 out of the said estates, as his capital, to remain in the house for five years, whether his said son should be living or dead, at interest after the rate of £3 per cent; and after the expiration of the five years, in case his son should be then living, at the same rate of interest as the other partners should receive for their respective capitals; and he thereby declared that the said £10,000, and the interest thereof, should be deemed part of the trust-moneys arising from the sale of his estates, and be subject to the trusts thereof, and be called in and applied upon the said trusts at the end of the five years, in case his son should then be dead without having attained a vested interest therein. [\*645]

From and after the death of Devaynes, the said Dawes, Noble, Croft, and Barwick continued to carry on the banking business under the same firm of Devaynes, Dawes, Noble, and Co., on their own proper account, —the representatives of Devaynes having no continuing share or interest in the business, or in the profits thereof; but being entitled by the partnership agreement only to his share of the profits to that period, and to his share of the then subsisting joint capital and effects, after payment of all the partnership debts and charges then charged and chargeable thereon. Devaynes the son did not become a partner; but shortly after the testator's death, (he being then about twenty-one, but not twenty-seven years of age,) made known to the trustees and executors, and to the surviving partners, his determination not to avail himself of the conditional directions in the will, but to decline the same, in consequence whereof the trustees did not place the £10,000, nor any other sum, in the house for him, or on his behalf. Neither Devaynes the son, nor the trustees, in any manner consented to the name of Devaynes being continued in the firm, except in so far as Noble, (who was one of the trustees, and also one of the surviving partners,) did, in his capacity of partner, concur therein with the other surviving partners; but on the contrary, shortly after the death of the testator, \*and at the request of Devaynes the son, the trustees gave notice in writing to the surviving partners, "that the use of the name of Devaynes in the firm was without their consent, and that they considered the testator's estate as wholly unconnected with the house;" which notice was drawn up and served by Messrs. Clayton and Scott, as solicitors for the trustees; but Mr. Clayton, (who was one of the selected claimants,) being resident at Newcastle, did not (as appeared by his examination before the master) know of the transaction until after the bankruptcy, Mr. Scott personally transacting the business in London, on behalf of himself and his partner; nor did it appear, by any evidence before the master, that any of the other selected claimants at any time knew or heard that any such notice had been given. It also appeared that the trustees had, by their said solicitors, (but without the personal intervention or knowledge of Clayton,) taken the opinion of counsel on the question whether they had power to prevent the surviving partners from continuing to use the name of Devaynes in the firm, and that the answers given were, that they had [\*646]

no such power, and that, if the name were used without their consent, no responsibility could attach upon the estate, whereupon they desisted from further opposition to the name being so used.

The master further reported, that the several selected claimants were all persons who, before and at the death of Devaynes, dealt with the said house of Devaynes, Dawes, Noble, and Co., as their bankers; and had respectively, at the time of Devaynes's death, such claims against the house in respect of such balances due to them, and of stocks and securities lodged with, and under the control and management of the house, as after mentioned; and all the said claimants (with the exception of Houlton) admitted that they became informed of Devaynes's death by the public papers, wherein the same was mentioned immediately, or very shortly after the event. But it was alleged by some of them that, finding no alteration in the firm, they supposed the estate, or the family of Devaynes, to be still interested therein, and responsible for the debts and transactions thereof; and, without making any inquiries to ascertain the [\*647] truth or falsehood of that opinion, they continued \*to deal with and employ the house as their bankers from the time of Devaynes's death to the time of the bankruptcy of the surviving partners.

The report proceeded to state the ordinary course of the banking business in London, in which the only general mode of stating and adjusting accounts between bankers and their customers residing in or near the metropolis, is as follows:—

A book called a passage-book is opened by the bankers, and delivered by them to the customer, in which, at the head of the first folio, and there only, the bankers, by the name of their firm, are described as the debtors, and the customer as the creditor in the account; and on the debtor side are entered all sums paid to or received by the bankers on account of the customer; and on the creditor side all sums paid by them to him, or on his account; and the said entries being summed up at the bottom of each page, the amount of each, or the balance between them, is carried over to the next folio, without further mention of the names of the parties, until, from the passage-book being full, it becomes necessary to open and deliver out to the customers a new book of the same kind. For the purpose of having the passage-book made up by the bankers from their own books of account, the customer returns it to them from time to time as he thinks fit; and the proper entries being made by them up to the day on which it is left for that purpose, they deliver it again to the customer, who thereupon examines it, and if there appears any error or omission, brings or sends it back to be rectified, or if not his silence is regarded as an admission that the entries are correct; but no other settlement, statement, or delivery of accounts, or any other transaction which can be regarded as the closing of an old, or opening of a new account, or as varying, renewing, or confirming, (in respect of the persons of the parties mutually dealing,) the credit given on either side takes place in the ordinary course of business, unless when the name or firm of one of the parties is altered, and a new account thereupon opened in the new name or firm. The course of business is the same between

such bankers and their customers resident at a distance from the metropolis, except that to avoid the inconvenience of sending in and returning the passage-book, accounts are from time to time made out by the bankers, and transmitted to the customer in the country, [\*648] when required by him, containing the same entries as are made in the passage-books; but with the names of the parties, debtor and creditor, at the head, and with the balance struck at the foot of each account; on the receipt of which accounts, the customer, if there appears to be any error or omission, points out the same by letter to the bankers; but if not, his silence after the receipt of the account, is in like manner regarded as an admission of the truth of the account, and no other adjustment, statement, or allowance thereof, usually takes place.

The report proceeded to state that the several selected claimants, with the exception of Sir John Palmer, Clayton, and Houlton, were all persons resident in or near the metropolis, who conducted their business with the house of Devayne, Dawes, Noble, and Co., as to their said accounts, according to the general custom, by means of their respective passage-books; and that the said Sir John Palmer, Clayton, and Houlton, being resident at a distance from the metropolis, conducted their business with the house according to the custom, in respect of customers so resident.

On the 30th of July, 1810, the surviving partners became bankrupt, and the defendants, Wilson, Morris, and Dorien, were appointed assignees.

The case of Miss Sleece, represented that class of claimants who were creditors of the house at the death of Devaynes, and afterwards continued to deal with the surviving partners, the operation upon whose debts by the subsequent dealings was merely a payment or payments to or to the use of the creditors by the surviving partners.

As to these, the master reported his opinion to be that such creditors had a right to resort to the estate of Devaynes, for the balance due to them, after deducting such payments made by the surviving partners.

The representatives of Devaynes excepted to this report, on the general ground, that, by the subsequent dealings, the creditors had released his estate, and assumed the surviving partners as their debtors.

\*The only special circumstances in Miss Sleece's case were the following:—At the death of Devaynes she had a balance of [\*649] £366 on her account with the partnership. On the 31st of January, 1810, two months after his decease, she drew a draft or check on the house, in the name of the old firm, for £50, which was paid to the bearer. No other receipts or payments took place till the bankruptcy, under which she proved for £316, the balance remaining, received dividends upon that debt, which reduced it to £216, and afterwards signed the certificate of the bankrupts.

THE MASTER OF THE ROLLS.

It can hardly be necessary in this case to enter into a detailed consideration of the ground and origin of the equity on which the claim of the creditor is founded. The decree assumes its existence, and has directed certain inquiries, the object of which was to ascertain whether

that equity be affected by anything that has passed subsequently to Mr. Devaynes's death. It may be proper, however, to observe, that the common law, though it professes to adopt the *Lex Mercatoria*, has not adopted it throughout in what relates to partnership in trade. It holds, indeed, that although partners are in the nature of joint tenants, there shall be no survivorship between them in point of interest, yet, with regard to partnership contracts, it applies its own peculiar rule; and because they are in form joint, holds them to produce only a joint obligation, which consequently attaches exclusively upon the survivors; whereas, I apprehend, by the general mercantile law, a partnership contract is several as well as joint. That may probably be the reason why courts of equity have considered joint contracts of this sort (that is, joint in form) as standing on a different footing from others. The cases of relief on joint bonds may be accounted for on the ground of mistake in the manner of framing the instrument; and it may be said that equity gives to them no other effect than it was the intention of the parties themselves to have given to them. But how is it possible to explain the cases upon partnership notes, so as to distinguish them from ordinary partnership debts?

In the case of *Lane v. Williams*, 2 Vern. 277, 292, the \*ground [\*650] of the decree was, not that the partnership had given a note, but that the note was given for a partnership debt. It was, not that the note was, either in its form, or in the intention of the parties, to be considered as the separate note of each; and, least of all, as the separate note of Williams, who knew nothing of the occasion of giving it, but the declaration in the decree (as taken by Mr. Raithby from the register's book) was "that Richard Newberry, and the defendant Williams's intestate, being partners at the time of borrowing the money and giving the note in question, and the said money being lent on the credit of such partnership, that either of the said partners was liable to pay the same." Then it adds, "and the rather, for that the defendant Williams took such bond from Newberry as aforesaid." That circumstance is stated as corroborating the equity in the particular case, but not as the ground of it, because it is explicitly declared that *qua* partners they were, each of them liable for the partnership debt.

In *Bishop v. Church*, 3 Atk. 961, 2 Ves. 100-371, though Lord Hardwicke doubted a little at first, whether it sufficiently appeared that the bond was intended to be separate as well as joint; yet, when it was ascertained that the money had been borrowed in the course of the partnership dealing, he thought the equity was perfectly clear. So in *Jacomb v. Harwood*, 2 Ves. 265, it is evident that Sir John Strange was of opinion that the estates of both partners were liable to the payment of the note, though it was not necessary to resort to that equity in the particular case, inasmuch as the surviving partner, being the executor of the deceased partner, had executed a mortgage to secure the debt, which it was held to be within his competency to do.

In *Daniel v. Cross*, 2 Ves. jun. 277, no doubt whatever appears to have been suggested with regard to this equity. The only question was,

Whether it had been waived by the subsequent dealings with the new house?

It is true, in *Ex parte Kendal*, 17 Ves. 514, the lord chancellor expresses some surprise at the introduction of this equity; but I do not understand him to have intimated a doubt of its existence. Indeed, his lordship acted on it in *Gray v. Chiswell*, 9 Ves. 118; for, if the remedy had been extinct in \*equity, as it was at law, the joint creditors would have had no more right to come on the surplus of the [\*651] effects than to share them with the separate creditors; yet, on the surplus they were admitted, and without regard to the manner in which their debts were constituted. In that case of *Ex parte Kendal*, the lord chancellor took it to be clear that the only question which Mr. Devaynes's representatives could make was, Whether these creditors had so dealt with the surviving partners as to make it inequitable in them to resort to his assets? Then, what is that sort of dealing by which this effect is to be produced? I apprehend it must be something very different from what has taken place in *Miss Sleech's* instance.

It is contended by the representatives of Mr. Devaynes, that Miss Sleech has lost her remedy against his estate, merely by not having prosecuted her demand in the interval between his death and the bankruptcy of the surviving partners, which is a period of about eight months. All that has passed in her case is, that she has received a payment of a part of her debt, and that she has taken no step for the recovery of the remainder of it. Now, if the equity stands upon any principle, upon what assignable principle can it be barred by this short arbitrary limitation? Upon what authority can a creditor be told, that the estate of Mr. Devaynes was, at the moment after his death, liable to his demand; but that he has no longer any claim upon that estate, even although in the meantime there should have been no dealing whatever between him and the surviving partners? In the case of *Lane v. Williams*, 2 Vern. 277, 292, there was certainly a much greater laches, if laches it is to be called; and the hardship that is insisted upon in this case was strongly complained of there,—of letting in the demand of a creditor upon the separate estate of the deceased partner after such a length of time; for the defendant, besides insisting that it did not appear that Williams was privy or consenting to the borrowing of this money, or that it was brought into stock, or used in the trade, further insisted that, had the plaintiff demanded it in the lifetime of Newberry, who was the surviving partner, or before his estate was wasted, and his assets exhausted, she, the defendant, might have had recourse to the bond of copartnership to repair the loss sustained by Newberry's taking up the \*money [\*652] and giving such note without the consent or privy of her husband; but she (his representative) had lost her remedy by the plaintiff's laches in not demanding the debt sooner, and therefore the plaintiff ought not to have the assistance of a court of equity to charge her. This, however, was urged in vain. The court said, very nearly in the terms I have already stated from the decree, that "the money being paid at the shop, the note of one partner binds both; and though at law the note stands good only against the executor of the surviving partner,

(who was Newberry,) who received the money, and signed the note, yet it was proper in equity to follow the estate of Williams for satisfaction."

In the case of *Daniel v. Cross*, 3 Ves. jun. 277, the partnership had been dissolved in the month of March, 1791. The testator died in June, 1791. Advertisements had been published for all the creditors to come in and claim their debts upon his estate. The bankruptcy of the new house did not happen till the month of March, 1793; and yet it was hardly contended that the lapse of time, from June, 1791, to March, 1793, was sufficient to exclude the claim upon the estate of the pre-deceased partner. The argument turned entirely upon the effect of the subsequent dealings. I take it, that it must therefore, upon the authority of these cases, and upon general principles, be held, that in the case of an ordinary partnership, it is impossible to say that Miss Sleech has been guilty of such laches as to preclude her from such remedy as she originally had against Mr. Devaynes's estate.

But it is supposed that there is a considerable difference between the case of bankers and that of any other partnership; and that it is impossible for the creditors of a banking-shop to permit their money to remain in the hands of the surviving partners for such a space of time as eight months, (indeed, the argument went to eight days, or even to a shorter period,) without recognising those surviving partners to be the depositaries of the balance due, and therefore exclusively responsible to make what is called the deposit forthcoming. There is a fallacy in likening the dealings of a banker to the case of a deposit, to which, in legal effect, they have no sort of resemblance. Money paid into a banker's [\*653] becomes immediately a part \*of his general assets; and he is merely a debtor for the amount. Therefore, when a man lodges money with a partnership of bankers, he is as much concerned to look to the solvency of each particular partner, as if he was lending the money to any other partnership. The money in each case equally ceases to be his the moment he has parted with it, and he has only to trust for the return of it, to the solvency of the persons into whose hands it passes; but he has, in each case alike, the credit and the responsibility of all the partners in the firm. Then, when one partner dies, what is to be inferred from the mere circumstance of allowing the debt upon the banking account to remain uncalled for in the hands of the surviving partners, beyond what would be inferred from not immediately calling in any debt due by the surviving partners in any other trade where money had been advanced or lent to that partnership? The security is permitted to stand just as it did, the party doing nothing to alter it. There is no *novatio debiti*,—no new contract,—no relinquishment of the old security, whatever it may, either in law or equity, be defined to be.

Then it is supposed that there is a rule of convenience which requires that the creditors of a banking-house shall make their demand for their balances upon the surviving partners within some very short period of time, or else be held to have waived their recourse against the estate of the deceased partner. Now, I doubt whether the estate of a deceased partner would, upon the whole, be much benefited by the establishment

of such a rule. For, if creditors were told that the only way in which they could preserve their recourse against the estate of a deceased partner, is by using all possible diligence to compel an immediate payment by the surviving partners of the whole of their balances, there are very few houses which could stand such a sudden and concurrent demand as that would necessarily bring upon them. A house might be reduced to a state of bankruptcy, which, in the ordinary course of business, would have been able to fulfil all its engagements; and a demand would be brought on the estate of a deceased partner, from which it might otherwise have wholly escaped; and, therefore, if expediency were to be taken into the consideration, I do not see what purpose of general convenience would be answered by \*compelling creditors to such a rigorous course as the condition upon which alone the hold which [654] equity gives them on the estate of a deceased partner could be retained.

#### CLAYTON'S CASE.

At the death of Devaynes, Clayton's cash balance in the hands of the partnership amounted to £1713, and a fraction.

After the death of Devaynes, and before Clayton paid in any further sums to his account with the bankers, he drew out of the house sums to the amount of £1260, thereby reducing his cash balance to £453, and a fraction.

From this time to the bankruptcy, Clayton both paid in and drew out considerable sums; but his payments were so much larger than his receipts, that at the time of the bankruptcy his cash balance in the hands of the surviving partners exceeded £1713, the amount of the cash balance at Devaynes's death. (And this exclusively of the exchequer bills and their produce, which were put out of the question in the consideration of this exception.)

By the amount of the dividends received since the bankruptcy, (those dividends being apportioned to the whole debt proved under the commission,) the balance of £1713 would be reduced to £1171, and a fraction; and it was this last sum which Clayton claimed against Devaynes's estate, and as to which the master had reported that Clayton had, by his subsequent dealings with the surviving partners, released the said estate.

But now, upon the argument of the exception, and in consequence of the decision in *Miss Sleech's case*, that claim was abandoned, to the whole extent of the cash balance at Devaynes's death, above £453, the sum to which it had been reduced by drafts upon the house previous to any fresh payments made to it; and that which was now claimed is the last mentioned sum of £453, minus its proportion of the dividends.

*Bell and Palmer, Fonblanque and Clayton*, in support of the exception.

\*This is a case, the decision of which will be of the greater importance, as it has lately been one of frequent occurrence, and [655] has never been decided, either at law or in equity. Suppose that, in this case, Devaynes, instead of dying, had merely quitted the partner-

ship; and that public notice had been given of that event, tantamount to the notice afforded by the advertisement of his death in the newspapers; and that the same transactions had taken place with the continuing partners which have now taken place with the surviving partners. In such case the question would have been a mere legal question; and what we submit is, that in such a case the retiring partner would clearly be liable to the extent of the £453; and if so, then that in the present case the rule of equity is strictly analogous to the rule of law.

**The MASTER OF THE ROLLS.**

Though the report, following, I presume, the words of the inquiry directed by the decree, states the master's opinion to be that Mr. Clayton has, by his dealings and transactions with the surviving partners, subsequent to the death of Mr. Devaynes, released his estate from the payment of the cash balance of £1713, yet the ground of that opinion is, not that the acts done amount constructively to an exoneration of Mr. Devaynes's estate, but that the balance due at his death has been actually paid off, and, consequently, that the claim now made is an attempt to revive a debt that has once been completely extinguished.

To a certain extent it has been admitted at the bar that such would be the effect of the claim made before the master, and insisted upon by the exception. To that extent it is, therefore, very properly abandoned; and all that is claimed is the sum to which the debt had at one time been reduced.

It would, indeed, be impossible to contend that, after the balance, for which alone Mr. Devaynes was liable, had once been diminished to any given amount, it could, as against his estate, be again augmented, by subsequent payments made, or subsequent credit given to the surviving partners. On the part of Mr. Devaynes's representatives, however, it is denied that any portion of the debt due at his death now remains unsatisfied. [\*656] \*That depends on the manner in which the payments made by the house are to be considered as having been applied. In all, they have paid much more than would be sufficient to discharge the balance due at Devaynes's death; and it is only by applying the payments to subsequent debts that any part of that balance will remain unpaid.

This state of the case has given rise to much discussion as to the rules by which the application of indefinite payments is to be governed. Those rules we probably borrowed in the first instance from the civil law. The leading rule with regard to the option given, in the first place to the debtor, and to the creditor in the second, we have taken literally from thence. But according to that law the election was to be made at the time of payment, as well in the case of the creditor as in that of the debtor, "*in re præsentis, hoc est statim atque solutum est:—cæterum, postea non permittitur,*" Dig. Lib. 46, tit. 3, Qu. 1, 3. If neither applied the payment, the law made the appropriation according to certain rules of presumption, depending on the nature of the debts, or the priority in which they were incurred. And, as it was the actual intention of the debtor that would, in the first instance, have governed; so it was his presumable intention that was first resorted to as the rule by



which the application was to be determined. In the absence, therefore, of any express declaration by either, the inquiry was what application would be most beneficial to the debtor. The payment was, consequently, applied to the most burthensome debt,—to one that carried interest rather than to that which carried none,—to one secured by a penalty, rather than to that which rested on a simple stipulation; and if the debts were equal then to that which had been first contracted. “In his quæ præsentī die debentur, constat, quoties indistinctè quid solvitur, in graviorem causam videri solutum. Si autem nulla prægravet,—id est, si omnia nomina similia fuerint,—in antiquiorem.” Dig. L. 46, t. 3, Qu. 5.

But it has been contended that, in this respect, our courts have entirely reversed the principle of decision, and that, in the absence of express appropriation by either party, it is the presumed intention of the creditor that is to govern; or at least that the creditor may at any time elect how the payments \*made to him shall retrospectively receive their application. There is, certainly, a great deal of [\*657] authority for this doctrine. With some shades of distinction it is sanctioned by the case of *Goddard v. Cox*, 2 Stra. 1194; by *Wilkinson v. Sterne*, 9 Mod. 427; by the ruling of the lord chief baron in *Newmarch v. Clay*, 14 East, 239; and by *Peters v. Andersen*, 5 Taunt. 596, in the common pleas. From these cases I should collect, that a proposition which, in one sense of it, is indisputably true, namely, that if the debtor does not apply the payment, the creditor may make the application to what debt he pleases,—has been extended much beyond its original meaning, so as, in general, to authorize the creditor to make his election when he thinks fit, instead of confining it to the period of payment, and allowing the rules of law to operate where no express declaration is then made.

There are, however, other cases which are irreconcilable with this indefinite right of election in the creditor, and which seem, on the contrary, to imply a recognition of the civil law principle of decision. Such are, in particular, the cases of *Meggott v. Mills*, *Ld. Raym.* 287; and *Dowe v. Holdsworth*, *Peake*, N. P. 64. The creditor in each of these cases, elected, *ex post facto*, to apply the payment to the last debt. It was in each case held incompetent for him so to do. There are but two grounds on which these decisions could proceed,—either that the application was to be made to the oldest debt, or that it was to be made to the debt which it was most for the interest of the debtor to discharge. Either way the decision would agree with the rule of the civil law, which is, that if the debts are equal, the payment is to be applied to the first in point of time,—if one be more burdensome, or more penal than another, it is to it that the payment shall be first imputed. A debt on which a man could be made a bankrupt, would undoubtedly fall within this rule.

The lord chief justice of the Common Pleas explains the ground and reason of the case of *Dowe v. Holdsworth*, in precise conformity to the principle of the civil law.

The cases then set up two conflicting rules,—the presumed intention

of the debtor, which, in some instances at least, is to govern,—and the [*\*658*] *ex post facto* election of the creditor, which, *\*in* other instances, is to prevail. I should, therefore, feel myself a good deal embarrassed, if the general question of the creditor's right to make the application of indefinite payments were now necessarily to be determined. But I think the present case is distinguishable from any of those in which that point has been decided in the creditor's favour. They were all cases of distinct insulated debts, between which a plain line of separation could be drawn. But this is the case of a banking account, where all the sums paid in form one blended fund, the parts of which have no longer any distinct existence. Neither banker nor customer ever thinks of saying this draft is to be placed to the account of the £500 paid in on Monday, and this other to the account of the £500 paid in on Tuesday. There is a fund of £1000 to draw upon, and that is enough. In such a case, there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably, it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts current are settled, and particularly cash accounts. When there has been a continuation of dealings, in what way can it be ascertained whether the specific balance due on a given day has, or has not been discharged, but by examining whether payments to the amount of that balance appear by the account to have been made? You are not to take the account backwards, and strike the balance at the head instead of the foot of it. A man's banker breaks, owing him on the whole account a balance of £1000. It would surprise one to hear the customer say, "I have been fortunate enough to draw out all that I paid in during the last four years; but there is £1000 which I paid in five years ago that I hold myself never to have drawn out; and, therefore, if I can find anybody who was answerable for the debts of the banking-house, such as they stood five years ago, I have a right to say that it is that specific sum which is still due to me, and not the £1000 that I paid in last week." This is exactly the nature of the [*\*659*] present claim. Mr. Clayton *\*travels* back into the account, till he finds a balance for which Mr. Devaynes was responsible; and then he says,—“That is a sum which I have never drawn for. Though standing in the centre of the account it is to be considered as set apart and left untouched. Sums above it and below it have been drawn out; but none of my drafts ever reached or affected this remnant of the balance due to me at Mr. Devaynes's death.” What boundary would there be to this method of re-moulding an account? If the interest of the creditor required it, he might just as well go still further back, and arbitrarily single out any balance, as it stood at any time, and say it is the identical balance of that day which still remains due to him. Suppose there had been a former partner, who had died three years before Mr. Devaynes—What would hinder Mr. Clayton from saying, “Let us see what the balance was at his death? I have a right to say, it still remains

due to me, and his representatives are answerable for it; for, if you examine the accounts, you will find I have always had cash enough lying in the house to answer my subsequent drafts; and, therefore, all the payments made to me in Devaynes's lifetime, and since his death, I will now impute to the sums I paid in during that period, the effect of which will be to leave the balance due at the death of the former partners still undischarged." I cannot think that any of the cases sanction such an extravagant claim on the part of a creditor.

If appropriation be required, here is appropriation in the only way that the nature of the thing admits. Here are payments, so placed in opposition to debts, that, on the ordinary principles on which accounts are settled, this debt is extinguished.

If the usual course of dealing was for any reason to be inverted, it was surely incumbent on the creditor to signify that such was his intention. He should either have said to the bankers,—“Leave this balance altogether out of the running account between us;” or, “Always enter your payments as made on the credit of your latest receipts, so as that the oldest balance may be the last paid.” Instead of this, he receives the account drawn out as one unbroken running account. He makes no objection to it, and the report states that the silence of the customer after the receipt of his banking account is regarded \*as an admission of its being correct. Both debtor and creditor must, [\*660] therefore, be considered as having concurred in the appropriation.

But there is this peculiarity in the case, that it is, not only by inference from the nature of the dealings and the mode of keeping the account, that we are entitled to ascribe the drafts or payments to this balance, but there is distinct and positive evidence that Mr. Clayton considered and treated the balance as a fund out of which, notwithstanding Devaynes's death, his drafts were to continue to be paid. For he drew, and that to a considerable extent, when there was no fund except this balance out of which his drafts could be answered. What was there in the next draft he drew which could indicate that it was not to be paid out of the residue of the same fund, but was to be considered as drawn exclusively on the credit of money more recently paid in? No such distinction was made, nor was there anything from which it could be inferred. I should therefore say, that on Mr. Clayton's express authority, the fund was applied in payment of his drafts in the order in which they were presented.

But even independently of this circumstance, I am of opinion, on the grounds I have before stated, that the master has rightly found that the payments were to be imputed to the balance due at Mr. Devaynes's death, and that such balance has, by those payments, been fully discharged.

The exception must, therefore, be overruled.

[\*661] \*WHERE A GUARANTEE IS GIVEN TO ONE FIRM FOR ADVANCES TO BE MADE BY IT TO ANOTHER FIRM, AND A CHANGE TAKES PLACE IN THE COMPOSITION OF EITHER FIRM, THE PARTY GIVING THE GUARANTEE IS NOT LIABLE FOR ADVANCES MADE SUBSEQUENT TO SUCH CHANGE, AND THE BALANCE DUE AT THE DATE OF THE CHANGE WILL BE DIMINISHED OR EXTINGUISHED BY PAYMENTS MADE SUBSEQUENT TO THAT DATE, UNLESS SPECIALLY APPROPRIATED BY THE DEBTOR OR CREDITOR FIRM.

# I.—BODENHAM v. PURCHAS.

Nov. 6, 1818.—E. 2 B. & AL. 39.

DEBT on a joint and several bond, dated 1st January, 1804, from the defendant and N. Purchas the younger, to the plaintiffs and William Havard, their deceased partner, in the penal sum of £9181, 16s. 6d. Plea, after setting out on oyer, the bond and condition, the latter of which was “for repayment by the defendant and N. Purchas the younger, or either of them, their or either of their heirs, executors, &c., unto the plaintiffs and Havard, their executors, &c., of a balance of £4590, 18s. 3d., with lawful interest, and also of such further sums as they the plaintiffs and Havard might advance or lend, remit or pay, to or on account or for the use of the N. Purchas the elder, or N. Purchas the younger, in the course of their business as bankers or otherwise, with interest, according to the usage and custom of their said business, not exceeding in the whole the said sum of £9000, without any deduction or abatement whatsoever;”—1st, non est factum, upon which issue was joined; 2d, payment of the said sum of £4590, 18s. 3d. and interest, and such further sum, &c., according to the condition of the bond. Replication to the last plea, that after making the bond plaintiffs and William Havard did advance to defendant, in the course of their business as bankers, and otherwise, according to the usage and custom of their business, the sum of £4409, 1s. 9d.; yet neither the defendant nor N. Purchas the younger, paid the said £4590, 18s. 3d. mentioned in the condition, or such further sum of money, but that the whole £9000 still remains unpaid and unsatisfied to plaintiffs. Rejoinder, that defendant [\*662] and N. Purchas the younger, or one of them, did pay \*and satisfy to plaintiffs and to William Havard, in the lifetime of William Havard, and to plaintiffs since the death of the said William Havard, the said sum of £4590, 18s. 3d., in the said condition mentioned; and the said further sum of money so advanced to the defendant, as in said replication alleged; and upon this issue was joined.

At the trial of the cause at the London sittings after Trinity Term, 1817, before Lord Ellenborough, a verdict was found for the plaintiffs for the penalty of the bond, subject to the award of an arbitrator, who by his award stated the facts of the case (as far as respects the point ultimately decided by the court) to be as follows:—

The action was brought by the plaintiffs, as surviving partners of William Havard, to recover £923 and interest, upon the bond set out in the

pleading, the execution of which was admitted. The plaintiffs and their deceased partner, long prior to and at the time of the execution of the bond, and from thence until the 30th April, 1810, carried on business as bankers at Hereford, in the firm of Bodenham, Phillips, and Havard, or Bodenham, Phillips, and Co. On the 30th April, 1810, Havard died. The defendant during all the period above mentioned kept an account with the plaintiffs and Havard, and usually balanced his accounts every three months, when he signed the ledger, and received his vouchers. On the 31st March, 1810, the balance was £2904, 11s. 7d. in favour of the plaintiffs and Havard, and on the 30th April in that year the defendant examined his account up to the 31st March preceding, received his vouchers, and signed the ledger as usual. On the 9th April the plaintiffs and Havard advanced a further sum of £1500, which appears to have been the only transaction between the 31st March and Havard's death; so that on the death of Havard the balance due from the defendant was increased to £4404, 11s. 7d. Upon the death of Havard the plaintiffs carried on the business, without making any alteration in their firm or their books till the latter end of the year, when they agreed to take Mr. John Garrett into partnership, as from the 1st July preceding; but although the style of the firm was then changed to Bodenham, Phillips, and Garrett, the accounts \*were continued in the same [\*663] manner as before, and the balance continued as if there had been no alteration in the firm. And on June 30th, 1810, no notice was taken of Havard's death, but the account, including items both subsequent and prior to that event, was then settled, and the balance of £1420 struck as if nothing had happened.

In June, 1813, the defendant relinquished his business, and on the 26th of that month signed an order, directing Bodenham and Co. to transfer his account to that of his sons, N. and R. W. Purchas. In consequence of which an account was made out by Bodenham and Co., which, after stating the several items, concludes thus:—"Balance transferred to Messrs. N. and R. W. Purchas, £2538, 13s. 10d."

This account was not signed by the defendant, but on the 30th July following, the plaintiffs delivered up to Nathaniel Purchas, junior, who had for some time acted as agent for his father, the vouchers for his father's accounts, the plaintiffs still retaining the bond. The balance of the father's account was accordingly transferred to the sons, who had for some time kept a separate account with the bankers under the firm of N. and R. W. Purchas. On the 30th June, 1813, immediately before the transfer, the sons' account was £620, 1s. 1d. in their favour; but by the transfer of the father's balance, was turned £1918, 12s. 9d. in favour of the bankers. The sons' account continued open with the plaintiffs and Garrett till 1816, when they stopped payment, the account having been balanced, and the vouchers given up quarterly; the balance was never reduced below the sum sought to be recovered, viz., £923, 14s. 8d., and when they stopped it was £3694, 18s. 9d. in favour of the plaintiffs. If the plaintiffs were bound to have applied, or are to be considered as having applied the first moneys received after the death of Havard, or after the transfer of the father's balance to the sons' account, to the discharge

of the balance due at Havard's death, or at the time of the transfer, sufficient money was received to liquidate such balance, but in fact no such application was directed or specifically made, nor was the balance on any quarterly or half-yearly settlement ever below the sum sought to be [\*664] recovered in this action of £923, 14s. 8d. There was not any thing said by \*or to the defendant respecting the bond, or any claim made upon him until the sons' failure; but on the plaintiffs and Garrett remonstrating with Nathaniel Purchas the younger, one of the sons, respecting the increase of the account from time to time, he told the plaintiffs they need not be under any apprehension, as they held his father's security, alluding to the bond. It was admitted that the sons had paid a composition of 15s. in the pound on the balance due, but expressly without prejudice to the plaintiffs' claim for the remainder against the defendant. Upon these facts it was contended by the plaintiffs that the whole of the balance due at the death of Havard had not been discharged, and that they were entitled to a verdict for the sum of £923, 14s. 8d., the remaining sum of five shillings in the pound, on the balance of the account as it stood at the time of the sons' failure. On the other hand, it was contended by the defendant,—1st, that the debt due at the death of Havard must be considered as discharged, either by the first moneys which were paid subsequently to the death of Havard, or by the fact of the transfer to the sons' account, or by the balance due to the sons immediately before the transfer, and the first moneys paid by them afterwards, and that therefore he was entitled to a verdict. The arbitrator was of opinion that the balance due at the death of Havard must be considered as discharged by the first moneys paid in after his death, and therefore ordered the verdict to be entered for the defendant, and if the court should think that he was right in that opinion, or that the balance was discharged by any other means, his award was to stand. An application having been accordingly made on the part of the plaintiffs to set aside the award, the court ordered the question to come on in the form of a special case, and it was argued by

*Chitty* for the plaintiffs.—The debtor not having specifically appropriated any of the payments to discharge the bonds, the creditors are at liberty to apply the same in discharge of the subsequent advances, and then the bond remains unsatisfied. For the rule of law to be collected from all the authorities, is this, that the debtor at the time of making payment may apply the same in discharge of any debt he pleases; but if [\*665] he makes \*no appropriation, then the creditor may at his election apply the same to the discharge of any one of several debts to the exclusion of the rest.—*Kirby v. Duke of Marlborough*, 2 M. and S. 18; *Peters v. Anderson*, 5 Taunt. 596, 1 Marshall, 238; *Bosanquet v. Wray*, 6 Taunt. 597; *Hall v. Wood*, 14 East, 243; and this rule applies even in prejudice of a surety, *Plomer v. Long*, 1 Starkie, 153. The award is founded upon *Clayton's case*, 1 Merivale, 572. That was the case of an unsecured banking account, continued after the death of one of the bankers by his surviving partners, who as such were liable to pay all debts incurred in the lifetime of their deceased partner. The question here arises upon a bond, conditioned not for the paying of one entire

sum, but for securing such advances as might from time be made. Such a bond, therefore, could not be satisfied by the first moneys paid into the banking house by the obligors, for it was intended as a continuing security for any balance that might at any time remain unsatisfied. To apply the doctrine of Clayton's case to this would obviously contravene the intention of the parties themselves.

*Osborne*, contra, was stopped by the court.

BAYLEY, J.—I cannot distinguish this in principle from Clayton's case. The decisions in the courts of law do not break in upon the distinction there taken. The principle established by those decisions is this, that where there are distinct accounts and a general payment, and no appropriation made at the time of such payment by the debtor, the creditor may apply such payment to which account he pleases; but where the accounts are treated as one entire account by all parties, that rule does not apply. In this case the bond was given in 1801, for advances made or to be made in Havard's lifetime; at his death, the balance due was £4404. The surviving partners might then have called for payment of that sum, or they might have treated it as an insulated transaction, and kept that as a distinct and separate account; but instead of that they blend it with the subsequent transactions; for in the first account delivered after Havard's death are included several items, down to the 30th of June, and the payments \*after his death reduce the [\*666] balance at that time to £1420. They might even then have treated this balance as a distinct account, and as money due on the bond, if they had so chosen; do they do so? Look to the next account. The parties balance their accounts every three months, and in the next quarterly account they bring forward the balance of £1420, and make it an item in one entire account subsisting between these parties. The account goes on from 1810 till 1813; and the then balance is treated as one entire balance of one entire account, as the result of all the transactions between the parties in the intermediate time. The plaintiffs were not bound to have so treated it at Havard's death, but having done so, there is not any authority for saying that they are now at liberty to apply the several payments in reduction of the debt incurred by the subsequent advances to the exclusion of the bond debt. It certainly seems most consistent with reason that where payments are made upon one entire account, that such payments should be considered as payments in discharge of the earlier items. Clayton's case, where all the authorities were fully considered by the master of the rolls, is directly against the plaintiffs' right to make any such appropriation as he desires. That case does not break in upon any of the cases at law, and ought to govern our decision in the present instance, and I am therefore of opinion that there ought to be judgment for the defendant.

ABBOTT, J.—I am also of opinion that the plaintiff is not entitled to recover. I think that this question is decided by Clayton's case, which was very fully argued. All the decisions were there before the master of the rolls, and he pronounced judgment against Clayton. It was a case decided upon great consideration, and is an authority of great weight. This case in principle is exactly the same. There it was holden that

payments made by surviving partners to Clayton, with whom there was a general account, should extinguish the old debt; here the converse of the proposition applies, and the payment by the debtor, to the surviving partners from time to time, upon one general account, including the old debt to the plaintiff and Havard, must, upon the same principle, extinguish that debt. The master of the rolls says, "In such a case," [\*667] (that is a banking account,) "there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account which is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts-current are settled, and particularly cash-accounts." The principle of that decision governs the present, and there must therefore be judgment for the defendant.

HOLROYD, J.—It seems to me that the transfer of the balance of the defendant's account, by the plaintiffs to the son, may be considered as the payment of so much money by the son, on account of the father, to the banker, and a reloan by them of the same sum to the sons. In *Wade v. Wilson*, 1 East, 195, which was an action for penalties for taking usurious interest, the declaration stated the loan to be from the defendant to one Goulton. The evidence was that Goulton owed Flintoft money on bond, and that the latter was indebted to Wilson; and that it was agreed between the several parties that Wilson should accept Goulton as his debtor, instead of Flintoft; Goulton accordingly gave his promissory note to Wilson for the sum therein specified, with five per cent. interest, and in addition to that paid a premium to Wilson. It was objected that there was not any loan of money from Wilson to Goulton; but that this was the mere substitution of one debt for another. The court, however, held that this constituted a loan from Wilson to Goulton, from the period of the date of the promissory note. The principle upon which that decision took place must have been that the acceptance of Goulton as the debtor, instead of Flintoft, operated as the payment of the debt of the latter; for if that debt were not paid, there could have been no loan from Wilson to Goulton. That case, therefore, would seem to show that the mere transfer by the bankers of the father's debt to the sons' account with their assent, operated as a payment of the father's debt by the sons, [\*668] and a reloan of the same sum to the latter by the bankers. It is unnecessary, however, to decide the question upon that ground; for Clayton's case, which seems to me to have been decided upon the soundest principles, is exactly in point with this, and ought to govern our decision; and upon the authority of that case I am of opinion that there ought to be judgment for the defendant.

Judgment for defendant.



## II.—CHRISTIE v. ROYAL BANK.

May 17, 1839.—S. 1 D. 745. House of Lords, April 6, 1841. 2 Rob. 118.

A BANKING COMPANY carried on business under the firm of Robert Allan and Son. The original partners of the company were Mr. Robert Allan, senior, and his son Mr. Thomas Allan, who latterly assumed as a partner Mr. Alexander Wight. On Mr. Robert Allan's death, in 1818, the business was carried on by Messrs. Thomas Allan and Wight; and in 1831, Mr. Robert Allan, junior, was assumed as a partner.

In March, 1832, the company obtained from the Royal Bank a cash credit to the extent of £20,000, and in addition to the obligation then granted by the partners, binding themselves as a company, and as individuals, Thomas Allan disposed to the appellants the estate of Lauriston, in security of their advances, under the usual conditions of cash credit bonds.

Thomas Allan died on the 12th September, 1833, but the business continued to be carried on by the surviving partners under the same firm. Shortly after his father's death, Robert Allan made up titles to and was infeft in the estates of Lauriston and Campse. At the date of Thomas Allan's death the debt due by the company to the appellants on the cash credit was £8800; and on the 31st December thereafter, the date of the first annual balance of the company's accounts after Thomas Allan's decease, the debt stood at £6765, 12s. 1d. The credit was operated upon in the same manner, and under \*the same account in the appellants' books, after Thomas Allan's death, as previously. At [\*669] 29th July, 1834, the balance against the company was reduced to £400, exclusive of interest; and during the intermediate period it was averred by the pursuers, that at least at one date, there was no balance at all against the company.

In July, 1834, the company applied to and obtained from the appellants an additional advance of £22,000 over and above the cash credit, in security of which an heritable bond and bond of corroboration and disposition in security was granted, being made applicable to the sums already advanced or to be advanced on the cash credit, which was thereby agreed to be continued, as well as to the new loan; and, in addition to the personal obligation undertaken by the creditors as individuals, Robert Allan disposed to the appellants, under the usual conditions, the lands of Lauriston and the lands of Campse, in security of the sum of £22,000 instantly advanced and paid to the company, and also in security and in further corroboration of the former bond for the cash credit. On this bond the appellants were infeft.

The sum of £22,000, advanced to Robert Allan and Son, was immediately paid in by them to the credit of the above cash account. The firm stopped payment in the end of August, 1834, and were sequestrated under the Bankrupt Act on 2d September following. The result of the operations on the cash credit, conjoined with the advance of £22,000, was to leave the company, at the date of the failure, debtors to the appellants in the sum of £42,000, exclusive of interest. Mr. Robert Christie,

accountant, was chosen trustee on the sequestrated estates both of Robert Allan and Son, and of the individual partners; and on 6th October, 1834, a decret of adjudication was pronounced in his favour, as trustee of the lands of Lauriston and Campse.

Adam Christie and others, who were creditors of Thomas Allan as an individual, or of the Banking Company of Robert Allan and Son previous to Thomas Allan's death, and of him as a partner thereof, with the concurrence of Robert Christie, the trustee on the sequestrated estates, brought an action in the Court of Session for reducing the bond and dis-  
 [\*670] position \*in security of July, 1834, as null and void, in terms of the provision of Stat. 1661, c. 24, against an heir making a voluntary disposition of his ancestor's estate, to the prejudice of the ancestor's creditors, before a full year had elapsed after the ancestor's death; and also for declaring that the debt due to the defenders, under the first bond and disposition of March, 1832, at Thomas Allan's death had been paid up, and that the lands thereby conveyed were no longer burdened therewith.

In defence, it was pleaded that the estates of Lauriston and Campse were not the property of Thomas Allan as an individual, but the property of the company of Robert Allan and Son, and held by him as their trustee, in which case there were plainly no grounds for the reductive or declaratory conclusions of the action. And even on the assumption that these estates were the private property of Thomas Allan, the security in question could not be challenged under the Statute 1661, c. 24, because it was not made to the prejudice of his creditors, but was in fact granted in favour of creditors of his, the money raised on it being paid to the company, who were such creditors, and appropriated to the extinction of debts for which he was responsible, and also because the Statute 1661, was not intended to avail creditors of the ancestors in any competition *inter se*. In any view of the case the security was effectual to cover the debt due at Thomas Allan's death, as it did not depend on his life, but was framed to continue after his death; and there was no dissolution of the company by his death, nor anything to limit the application of the security by the defenders to transactions previous thereto.

Several questions were submitted by the judges of the second division of the court to the other judges for opinion. One of these questions was, "Whether, and to what extent, the bond of 30th March, 1832, remained in force as a continuing guarantee and security over the estate of Lauriston, to cover advances, or any balance due upon advances, made by the defenders to the company of Robert Allan and Son, at or after Thomas Allan's death, and down to the date of the final sequestration of the company; or if it did not so remain in force, at what period did it  
 [\*671] cease to operate as a continuing guarantee and \*security over the estate of Lauriston; and whether the balance, if any, that may have been due when the said bond ceased so to operate as aforesaid, was paid, or wholly or partially extinguished subsequently."

Lord MONCRIEF returned the following opinion, in which Lords GILLIES, JEFFREY, MACKENZIE, COCKBURN, and CUNINGHAME concurred:—This question appears to me to be attended with considerable

difficulty. I am of opinion that the company of Robert Allan and Son, which was constituted by the minute or notes of agreement of 29th August, 1831, must be considered as having been dissolved, in regard to any question concerning the estate or the proper representatives of Thomas Allan, by his death on the 12th September, 1833, or at least at the 31st December, thereafter. The contract was not of such a nature that the parties severally contracted for themselves and their heirs. It is indeed indefinite in endurance; but, so far from supposing that the company was to continue unchanged on the death of one of them, it expressly provides that the heirs of the deceasing partner shall not even be entitled to look into the books, and that their interest in its funds shall be at once determined by the balance to be made up by the survivors at the time appointed. It may probably be true that the surviving partners must be considered as still the members of a subsisting company between themselves. There is no question here as to their obligation to continue partners with one another; though, in an agreement of indefinite endurance like this, this might admit of much doubt. But the question before the court is of a more limited nature, relating merely to the change in the state of the company produced by Thomas Allan's death, in regard to him, or the rights of others with relation to him or to his estate.

Neither can I think that the company must be considered as unchanged in this question, because the same firm was continued, and there was no notification of a dissolution. Death operates a dissolution of itself; and being a public fact all men are bound to know it. See the doctrine laid down by Lord Eldon, as quoted by Mr. Bell, vol. ii. p. 639. But in the present case, surely the Royal Bank cannot plead want of notice of \*Thomas Allan's death, when they took their disposition of his [\*672] estates from his son and heir; and knowledge of the death must presume notice of the dissolution, unless the fact had stood otherwise by the contract. But though the son was still a partner of the succeeding company, he was so, not as heir of Thomas, but in his own capacity, in terms of the contract; and of this also the deeds executed gave the bank full notice. It may be doubtful whether the dissolution should be considered as having taken place at the moment of Thomas Allan's death, or not till the 31st of December, 1833, when the balance of the books was made. I have had hesitation on this point; but, on the whole, I am inclined to think that the company, though in the process of winding up, must be considered as having gone on till the time for striking the balance; because till that time the representatives of Thomas Allan, as such, had still an interest in the transactions. But assuming that there was a dissolution of the company of which Thomas Allan was a partner, this does not exhaust the subject of the query put to us. Two points remain of considerable nicety.

The defenders maintain that the special security given by the deed of 30th March, 1832, having been so given upon a cash credit to the company trading by the firm of Robert Allan and Son, must subsist to the effect of covering the operations under that credit, notwithstanding that by Thomas Allan's death the actual company had come to be different

from what it was before. I do not think it a good answer to this plea to say that it would be enabling the heir to apply the estate of the ancestor within the year to the payment of his own debts; because this does not stand on any disposition by the heir, but on the disposition by the ancestor himself; and if he chose to convey his estate in security of debts to be contracted even by third parties, there is no doubt that it would be effectual to the creditor, whether the grantor was alive or dead, as for a debt arising on the credit of that special security given by him. The question, therefore, is not free from difficulty.

On the whole, however, I am inclined to think that the bond of security granted by Thomas Allan ought not to be construed as having been truly intended as a security for any cash credit except to the company [\*673] of which he himself was a partner; and \*that therefore it should be held to have ceased to be a fund of credit as soon as his death dissolved the connexion between him and the company bearing the firm. It was in reality an obligation of guarantee—an impledging of his security for a special object. He happened to be a partner of the company in whose behalf it was given; but he might not have been so, and still might have given such a security. In such a case, there can scarcely be a doubt that a guarantee or security, given for Robert Allan and Son, while A. B. was a partner of that house, would not have been effectual to cover advances made to a company bearing the same firm after that person had ceased to be a partner of it. The principles of the case of *Houston's Executors v. Spiers, &c.*, 4th March, 1820, seem to imply this.

But, besides this view of the matter, it is to be observed, that if there was a dissolution of the first company, or a change which rendered the firm of Robert Allan and Son in reality a new company, the personal obligation in the original bond by the old company must truly have fallen as to Thomas Allan, however it might subsist against the new or continued company, and the individuals who still operated on the credit. And if the personal obligation of the company for whom Thomas Allan interposed the security of his heritable estates had fallen, it cannot be held on any sound principle that the special security so interposed could subsist, for advances made after this essential change on the effect of the credit had taken place.

The second point maintained by the defenders in this part of the case appears to be more important; and I am inclined to think that it is well founded.

The pursuers very anxiously maintain that this case is altogether within the principle of the well-known case of *Devaynes*; and that if they can show that at any time after the death of Thomas Allan the payments made by the surviving firm into the cash account were sufficient to pay all the balance which was due at the time of his death, or at the striking of the balance, that debt must be held to be swept away, and all the debt remaining at the time of the bankruptcy must be taken [\*674] as the debt of the new company, and so the debt of the \*heir, and not of the ancestor. It appears to me, that there is considerable confusion in the argument of both parties on this question; and my

opinion is, that the case of Devaynes does not apply in the circumstances in the extent pleaded. In that case, a private party had money deposited with a company of bankers; at a certain point of time one of the partners of that company died. This was taken clearly as a case of dissolution; but the party went on to deal with the new company on the same account, and from them he received all that had been due at the death of the partner. After that he made further deposits; and then a bankruptcy of the new company took place, while the balance was considerably in favour of the depositor. The claim made was against the representatives of the deceased partner; and this was held to be inadmissible, because the first payments made after the creditor had acknowledged by his deposits and drafts the continued account with the new company, were considered as applicable to the debt as it stood at the death of the partner, and therefore to have extinguished it.

It is very difficult to assimilate the present case to that case. There is a puzzle in the argument of the defenders, not altogether sound, arising from the circumstance of there being here two banks, constituting the debtors and creditors in the account. But still there is a real difficulty. The claim arises on the account kept in the Royal Bank. But they are not the debtors as in the case of Devaynes, but the creditors; nor was Mr. Thomas Allan the partner of that corporation, whose death could have raised any question. The Royal Bank are creditors of Robert Allan and Son, not upon any money simply deposited with them, but on payments made in answer to drafts which were recognized only in respect of the special security held from Thomas Allan. Now, if there was a dissolution of the company for whose behoof that security was granted, and if the Royal Bank, erroneously believing that the security was still available for new advances to a different company, allowed the account to go on without closing it, and afterwards came to be greatly in advance to the new company, it would be contrary to all equity that the accounts should still be blended together, and that the bank should be deprived of the benefit \*of their security, derived specially [\*675] from the deceased partner, even for that part of the debt which was truly due to them at the time of his death. On the most common principles, since the security has been found unavailable for the subsequent advances, they are entitled, when the accounts come finally to be adjusted, to impute the payments to the debt least secured, and to resort to their security for that debt to which it is clearly applicable.

I am sensible that the judgments pronounced by the court and the house of lords, in the second branch of the case of *Houston's Executors v. Spiers* and others, may also deserve attention. But it rather appears to me that there is also an important difference between that case and the present. The payments, which this court held might at certain points of time diminish the debt existing when the change in the mode of transacting was made, which had been held to liberate the cautioners from the subsequent drafts, were all payments by the same party who had contracted the first debt. He made the remittances, and all the drafts both before and after the change were his; and the court were of

opinion that such remittances made by him might justly be imputed to any part, or the earliest part of his drafts. But the state of the matter is quite different here. The first debt was contracted by one company, that of which Thomas Allan was a partner, and for that the bank held the security of his estate. The payments which are now said to have extinguished it were made by another company on their own account; and on the faith of those payments, if not on that of the special security, that other company received credit for the further drafts made by them. This is a very different affair from that of one party making drafts and making payments. If the companies are found to be different parties, their payments, no more than their drafts, can be confounded. There is a special security for the debts of the one, none for those of the other. Is it just at once to take away the security from the debts of the new company, and to make their payments liquidate the debt of the old company, while the debts contracted by themselves to the same party are left unpaid and unsecured? There is plainly an essential difference between [\*676] this case, and both the cases of *Devaynes* and *\*Houston*; and, I think, a difference entering into the essential equity of the whole matter. Nevertheless, I feel all the doubt attending the question.

But, on the whole, I am inclined to think that the principle of the cases of *Devaynes* and *Houston* cannot in this point be made to apply to the present case; and that the defenders are entitled to the benefit of the security for whatever debt was due at the time of striking the balance on the 31st December, 1833, after the death of Mr. Thomas Allan.

Lord President HOPE and Lord FULLERTON returned the following opinion, in which Lord COREHOUSE concurred:—We think that the bond of 30th March, 1832, did not “remain in force as a continuing guarantee and security over the estate of Lauriston, to cover advances, or any balance due upon advances, made by the defenders for the company of Robert Allan and Son, down to the date of the final sequestration of the company.” It was granted in security of advances to be made to the company of Robert Allan and Son, consisting then of the individual partners, Thomas Allan, Robert Allan, and Alexander Wight. Such a security could not cover advances made to a different company, though carrying on business under the same firm. The security, therefore, necessarily fell at the dissolution of the company in whose behalf it was granted: and it appears to us that that dissolution took place on the death of Thomas Allan, on the 12th of September, 1833. That event had the same effect in a question of this kind as if Thomas Allan had withdrawn his name from the company, and given due intimation; the notoriety of the death of a partner being held sufficient to supply the place of such intimation. Neither do we think that the point is affected by the twelfth article of the notes of agreement, providing that in the event of the death of any partner, the right of the heirs or representatives should be determined by the state of the deceased’s account at the first balance after the decease, as attested by the survivors, and excluding the right of the heirs to examine the books of the company. This very article seems quite conclusive against the supposition of the continuance of the company in the person of the heirs or representatives of Thomas Allan,

\*particularly in a question of this kind, in which the continuance of the security is held to depend on the continuance of that [\*677] control to be exercised by the different individual partners, in reliance on whose discretion it is presumed to have been made. We do not think, therefore, that, consistently with the strict interpretation of all obligations of this kind, the defenders were entitled to make advances on the security subsequently to the death of Thomas Allan. But really this point is of very little importance, considering the admissions made by the defenders, in reference to the matters falling under the concluding part of this question.

The remaining part of the question, "whether the balance, if any, that may have been due when the said bond ceased so to operate as aforesaid, was paid, or wholly or partially extinguished subsequently," does not seem to present much difficulty. For it is very fairly admitted, not only that at the date of the second bond "the whole of the defender's advances to the company were satisfied and paid, with the exception of about £400, but that between the date of Mr. Allan's death and the date of the second bond, periods might even be pitched upon when, in consequence of the sums paid in by the company, and standing at their credit, there was no balance whatever due."

In these circumstances, there is no necessity to resort to the full extent of the rule adopted in the case of *Devaynes*; for whatever difficulty there might be in holding the subsequent successive payments to be applicable to the reduction of the balance as it stood at the date of the termination of the guarantee, while the gross balance of the account, viewed as a continuous account, and taken at any one period, remained undiminished, it seems to us clear, that, if at any one moment the balance outstanding at the expiration of the guarantee was actually cleared off, a new balance could never be reared up against the cautioner by subsequent transactions.

In regard to this point, the case is much less favourable to the defenders than that of *Houston v. Spiers*, 3 W. and S. App. 392, which, in all its essential particulars, nearly resembles the present. There, as here, a question occurred regarding a claim for advances made on a current account against the cautioners; a change having taken place in the modes of drawing, which \*was held to extinguish the guarantee from the particular date of that change. The Court of Session there [\*678] took what appears to be a very equitable view, and held that the cautioners were not entitled to derive benefit from the subsequent remittances made to the credit side of the account, except in so far as those remittances, when compared at any one period of the account with the drafts, had the effect of reducing the balance below the amount for which the cautioners were bound at the date of the expiration of the guarantee. It is evident that the principle of this judgment would, in consequence of the above-quoted admissions, be quite sufficient to support the case of the pursuer. But the cautioners appealed against this judgment of the court, and the result was a reversal,—a judgment giving full effect to the principle of the decision in the case of *Devaynes*. At least this seems to us the fair inference from the judgment, which is our only source of information on

the subject, as the report contains no statement of the special grounds on which it was pronounced.

And we may add, that we see no room for distinguishing between that case and the present. It is true that the circumstance which, in the present case, extinguished the operation of the security from a particular period of the account, was the dissolution of the old company of Robert Allan and Son, by the death of one of the partners. But that did not necessarily break the continuity of the account, unless the parties chose to close it; for though the former balance had been contracted by the old company, yet as the new company confessedly adopted all their rights and responsibilities, the balance just became as much the debt of the new company as if it had been originally contracted by them; and the effect of their subsequent dealings on that balance must depend on the very same principle. The defenders might have closed the old account, and probably would have done so, had they foreseen the actual result. But as they did not close it, and as payments were made by the new company to their credit in that continued account, the effect of those subsequent payments, in regard to the former balance, as at a particular date, was not a matter within the discretion of the defenders, but is exclusively determinable [\*679] by the legal principles applicable to the case. If these principles had admitted of any equitable modification, and if it had been held competent, after the event, to split the account into two portions, at the date of a particular balance, from a consideration of what the party would in all probability have done had he contemplated the result, there could not be stronger grounds for applying that equitable modification than in the case of *Houston v. Spiers*.

There the guarantee had been granted to the house of Fraser and Company, for drafts to be drawn on them by H. and R. Baird, and to be replaced by remittances from time to time. Transactions took place on this footing till the close of the year 1809, when the balance unquestionably covered by the guarantee stood at about £7000. In the end of December, 1809, Fraser and Company changed their firm to Fraser, Houston, and Company, the partners remaining the same. They intimated this to H. and R. Baird, at the same time desiring them to draw not directly on the new firm, but on a banking-house in which they were partners, "Value in account with Fraser, Houston, and Company." Under this new arrangement the subsequent drafts were drawn, and the remittances were made to Fraser, Houston, and Company; they, however, continuing the account as one current account, which was not closed till the bankruptcy of H. and R. Baird in 1811, at which time there was a balance against them of £5739. For this balance the action was brought, Fraser, Houston, and Company against the guaranties. By the first judgment in the cause, the court, 4th March, 1820, found that the drafts drawn subsequently to the 1st January, 1810, were not covered by the guarantee, in consequence of the change of the mode of drawing. But then arose the very question which arises here, viz., How the balance as it stood at the end of the year 1809, which the guarantee undoubtedly covered, was affected by the subsequent remittances to the credit side of the current account? If the account had admitted of being separated at



the date of the balance, the case of the pursuers would have been clear. The equitable considerations supporting that view were strong, so strong as to force themselves on the attention of the accountant, to whom a reference on this point of the case had been made. "It is with deference that the accountant submits his \*opinion, that as the court have found that the defenders are not liable for Mr. Logan's drafts [\*680] on the banking-house, because they were not made in terms of the guarantee, they are not entitled to derive benefit from remittances made to a different firm from that to which this letter of guarantee is addressed; and but for which remittances it is not probable the new firm would have authorized the banking-house to accept Mr. Logan's drafts." 3 W. and S. 398.

These considerations were disregarded, however, both by the Court of Session and the house of lords, who, although differing in one point, viz., the precise mode in which the subsequent remittances affected the balances at the end of the year 1809, concurred in treating the account as one current and continuous account, being the form of dealing adopted by the parties at the time, without any regard to the mere probability that one of the parties would have closed the account at a particular date, if he had attended to all the consequences of keeping it open.

It does appear to us, then, that the case of *Houston v. Spiers*, following on that of *Devaynes*, in the first place, establishes, that in the case of a current account, it is not competent for a party to select a particular balance at a particular date, as distinct and not affected by the subsequent operations; and secondly, determines the effect of those subsequent operations on any balance of a particular date, on principles which are conclusive against the defenders on this branch of the cause.

At the advising in the second division, Lord Justice-Clerk BOYLE observed.—The question then remains, Whether the principle established by the decision in the case of *Devaynes*, and subsequently followed out in that of *Houston's Executors v. Spiers and others*, applies to the state of accounts between Robert Allan and Son and the defenders? It appears to me that, by the death of Thomas Allan, and the consequent dissolution of the company, the security granted by him could no longer be available to the defenders, as being strictly applicable only to a credit for the benefit of a company, of which Thomas Allan was a partner. If, then, the account kept by the defenders, and still allowed by the defenders to be operated upon \*by Robert Allan and Son after Thomas Allan's death, is to be held as a continuous account, and no pause in it [\*681] or resting-place is stated to have occurred, it seems difficult to deny the application of the principle of the case of *Devaynes*, that if the balance existing at the time of Thomas Allan's death was afterwards wholly or nearly extinguished, by payments made previous to the grant of the new security, which is fully admitted in fact by the defenders, that balance cannot be again reared up as being covered by the security granted by Thomas Allan, in consequence of posterior advances made on the drafts of the company of Robert Allan and Son.

If the circumstance of the account in this case not being a deposit one, as that in *Devaynes's* case was, and that the defenders are creditors

and not debtors, is to be held as rendering the cases essentially different, as assumed in the opinions of Lord Moncreiff and others, the effect of the decision in Devaynes's case may be got rid of; but I feel myself more disposed to concur in the view that is taken in the opinion subscribed by the lord president and Lord Fullerton, particularly when the decision of the house of lords in the case of *Spiers v. Houston's Executors*, as reported in *Wilson and Shaw*, vol. iii. p. 393, is attended to.

**LORD MEADOWBANK.**—I incline to concur in the opinion of the lord president and Lords Fullerton and Corehouse.

**LORD MEDWYN.**—The next point is, Whether the views in the case of Devaynes, and the judgment in the case of *Houston*, as reversed by the house of lords, compel us to find that the balance due under the bond in 1832, at Thomas Allan's death, was discharged by the payments into the account, without taking into view the corresponding drafts on the other side?

I hold that the copartnery expired at the death of Thomas Allan notwithstanding the clause for regulating the interests of the representatives of a deceased partner in the stocks of the company. I further hold, that the bond of 1832 was only for the transactions of the company of which Thomas Allan was a partner, contrary to what, in practice at least, was at one time held to be the effect of a company continuing under the same \*firm, and undertaking all the responsibilities, and succeeding to all the claims of the original company; but I entirely adopt the view of Lord Moncreiff, and a majority of the consulted judges on this part of the case. I have always considered it the most palpable misapplication of a principle, to hold that the judgment of Sir William Grant in *Clayton's case* should regulate this, which is just the opposite case, and deprive the creditor of his privilege of applying an indefinite payment in the manner he thinks most favourable to himself, more especially when it is perfectly obvious that the payments the bank continues to make are on the faith and the security of the payments made to it on the opposite side of the account; and nothing can be so unjust as to apply these to discharge the balance secured under the bond, and leave the payments on the other side not only unsecured by the bond, but not even in so far diminished by the payments which have been made into the account, which, in fact, were the inductive cause of the subsequent payments by the bank.

In *Clayton's case* the account is always in favour of Devaynes and Company, that is, they always have money of Clayton's in their hands. Devaynes dies, the company continues, and Clayton continues to deal with them, to draw his money out and pay it in. The first transaction is a draft showing he was drawing his own money; soon after the banking-house fails, and Clayton claimed the balance due at Devaynes's death from Devaynes's representatives. Sir William Grant held that the customer drawing out his money had not the privilege of appropriating it as an indefinite payment, but that, in such a current bank account, the draft must be applied to the oldest deposit; so that he could not say I have drawn out the sums subsequently paid in, but have left untouched the balance due to me at Devaynes's death.

That is sound. But the principle is totally inapplicable in this case. There the payments by the bankers were made because it was the customer's own money deposited with them. They were indebted to him; they were thus bound to pay his drafts, and these drafts discharged the debt due by them. Here the bank owed Allan and Son nothing; on the contrary, the bank was their creditor, and when the bank answered \*these drafts, it was not that the bank was paying a debt it owed, [\*683] but, on the contrary, was making a further advance on the faith of the payments to be made by Allan and Son; and when such payments are made, being indefinite payments, I cannot see why the bank should not have the usual privilege of a creditor to place them to the discharge of the debt least secured, more especially when the advances are made on the faith of these very payments.

But then I doubt if my view of the law will much assist the defenders; for it seems admitted, that prior to the date of the bond, 1834, the debt under the former bond had been reduced to £400, and the interest due on the account. Now I do not think that, under the bond granted by Robert Allan, within the year of his father's death, the balance could be increased. So far as it is a bond of corroboration, it cannot have greater effect than the original bond; it is only to confirm it, and I think the effect of it can only be to cover the original balance under it, in so far as it remained unreduced by payments, taking into view the payments on both sides of the account; and this, as already said, leaves only a balance of £400, and the interest due on the account to be recovered under the bond of 1832, which to that effect still subsists and requires no corroboration.

So far as payments were made under it, so as to raise the debt which, at its date, was only £400 up to £20,000, it is an advance made under this new bond to the new company; and the bond to that extent must be reducible if the estates are held to have been individual property, and that the Act 1661 applies.

The court adhered to the interlocutor of the lord ordinary repelling the defences, and decerned in terms of the conclusions of the summons.

The defender having appealed, the judgment was affirmed.

LORD CHANCELLOR observed.—The question which it seems expedient to consider, in the next place is, whether at the time of the date of the second bond anything was due to the Royal Bank, the appellants, from the estate of Thomas Allan alone. \*The bond of the 30th of March, [\*684] 1832, was to secure repayment to the bank of any balance to the extent of £20,000, which might be due to the bank from Robert Allan and Son, in which Thomas Allan was a partner, in respect of advances and accommodation to be afforded to them by the bank. Thomas Allan died in September, 1833, and, beyond all doubt, by that event the firm of Robert Allan and Son, as it had up to that time existed, was dissolved, so far as it affected the bank. That the business was to be considered as going on as before, for the purpose of settling between the surviving partners and the estate of the partner deceased, by special agreement between the partners, cannot affect the question. And it is also quite clear that the security which Thomas Allan so gave to the bank to secure

the repayment of advances made to the firm in which he was a partner,—that is, to himself and his partners,—could not be used as a security for advances made after his death to a firm in which he was not a partner,—that is, to the persons who had been his partners, whether they continued the old style and firm, or adopted another.

Now, it is not in dispute that the payments made by the surviving partners, with whom the account was continued after Thomas Allan's death to the bank, without any specific appropriation prior to the date of the second bond, exceeded the amount of the debt due to the bank at the time of Thomas Allan's death; and the appellants admit, (as appears on the 59th page of their case,) that there were periods between the time of Thomas Allan's death and the date of the second bond at which there was no balance due to the bank; and that at the date of the second bond there was only a balance of £400 and interest due. So that there is no ground upon which it can be maintained that the debt due at the death of Thomas Allan was not paid at the date of the second bond, except that of the bond of 1832 being available to secure advances made after the death of Thomas Allan, for which there is no pretence.

It seems to have been supposed by some of the learned judges that the case of *Devaynes*, 2 R. p. 197, was not applicable to the present, because this was a case of credit and not of deposit. Those learned judges recognise the law in *Devaynes's* case as applicable to Scotland, as indeed the case of *\*Spiers v. Houston*, 3 W. and S., 4 Bligh, [685] 215, assumes it to be. It is to be regretted that the subsequent decisions which have taken place in England upon that subject were not brought under the consideration of those learned judges. If they had been, I have no doubt but the application of the principle in its full extent to this case would have been recognised by them. Many cases have occurred in this country, but it is sufficient to mention *Pemberton v. Oakes*, 4 Russell, 154; *Bodenham v. Purchas*, 2 Barn. and Ald. 39; and *Simson v. Ingham*, 2 Barn. and Cres. 65; because in one or other of those cases all the circumstances occurred which have been supposed to distinguish this case from *Devaynes's* case, 2 R. p. 197.

Without, therefore, calling in aid the fact that the whole debt at the time of Thomas Allan's death was destroyed by the balance due to the bank from the continuing firm having ceased to exist, such debt so due at Thomas Allan's death would have been discharged by the application of the subsequent payments to such debts,—such payments having been made without any appropriation by the parties paying, and having been carried by the parties receiving such payments to the account kept by them consisting of the old and new transactions, and constituting therefore a continuing account, and from which appropriation it was not competent for the bank to remove such payments at a subsequent time, when the consequences were seen; as was decided in *Bodenham v. Purchas*, 2 Barn. and Ald. 39, one of the cases I have just referred to.

When, therefore, Robert Allan, the son of Thomas, executed the second bond to induce the Royal Bank to continue to himself and his then partner the floating credit to the amount of £20,000, and to advance £22,000 for their use, he was not dealing with a creditor of his father, or giving

to any such creditor a security for any debt of his father, but he was providing for a credit to himself, and securing a debt of his own, upon the security of property derived by him from his father, and that within one year of his father's death, which is precisely the case guarded against by the Statute of 1661, c. 24.

In what way this transaction might operate upon the state of the account between Thomas Allan's estate and the surviving partners, does not appear to me to be in the least material. \*That was not the object or immediate effect of the transaction, and it is not proved that what [\*686] was advanced by the bank was applied in payment of the debt due from Thomas Allan to the firm. The question, therefore, does not arise, Whether within the statute an heir can within the year effectually prefer one of his ancestor's creditors to another, by giving to him a security upon the ancestor's estate? The ground upon which I rest my opinion is, that the bond and security of 1834 was not given to secure or pay any debt of the father.

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1. In the case of *Weston v. Barton*, 4 Taunt. 680, MANSFIELD, C. J., observed,—"The question here is, whether the original partnership being at an end, in consequence of the death of Golding, the bond is still in force as security to the surviving four; or whether that political personage, as it may be called, consisting of five, being dead, the bond is not at an end?" The case has stood over in consequence of doubts which the court entertained on particular expressions in the bond. Many cases were cited at the bar, and the result of them is that generally when a change takes place in the number of persons to whom such a bond is given, the bond no longer exists. These decisions certainly fall hard on the obligees; for I believe the general understanding is that these securities are given to the banking-house, and not to the particular individuals who compose it; and we should readily so construe the bond if the words would permit. The words of the condition on which the question depends, again and again refer to the obligees' capacity of bankers; they were bankers only as they were partners in their banking-house, as it is called, and this security is conditioned to pay any money advanced by 'them five or any or either of them.' Taking those last words by themselves, it might at first be conceived that if any one of the five advanced money, this bond should secure it, but the words are afterwards explained, when it is seen that the money is to be paid to the five. Now it could never be intended that money advanced by one of them singly, should be repaid to the five; and this shows that the words 'advanced by them or any or either of them,' must be confined in their meaning to money advanced by any or either of them in their capacity of bankers, on behalf of all the five. This, then, being the construction of the instrument, from almost all the cases, in truth we may say from all, (for though there is one adverse case of *Barclay v. Lucas*, the propriety of that decision has \*been very much questioned,) it results that where one of the obligees dies, the security is at an end. It is not neces- [\*687] sary now to enter into the reasons of those decisions, but there may be very good reasons for such a construction: it is very probable that sureties may be induced to enter into such a security, by a confidence which they repose in the integrity, diligence, caution, and accuracy of one or two of the partners. In the nature of things there cannot be a partnership consisting of several persons in which there are not some persons possessing these qualities in a greater degree than the rest; and it may be that the partner dying, or going out, may be the very person on whom the sureties relied; it would, therefore, be very unreasonable to hold the surety to his contract after such change. And though the sum here is limited, that circumstance does not alter the case; for although the amount of

the indemnity is not indefinite, yet £3000 is a large sum; and even if it were only £1000, the same ground in a degree holds, for there may be a great deal of difference in the measure of caution or discretion with which different persons would advance even a thousand pounds; some would permit one who was almost a beggar to extend his credit to that sum; others would exercise a due degree of caution for the safety of the surety; and, therefore, we are of opinion, that as to such sums only, which were advanced before the decease of Golding, can an indemnity be recovered by the plaintiffs; and as to the sums claimed for debts incurred since his decease, the judgment must be for the defendant."

2. In the case of *Spiers v. Houston's Executors*, May 22, 1829, 3 W. and S. 392, a party applied to a banking firm for a cash credit, which was granted on a guarantee by the appellant. After the first year the firm desired the party having the cash credit to draw in future on another banking house, and his bills were accepted by that house, but no notice of this change was given to the sureties. On the party having the cash credit becoming bankrupt, the sureties were sued for the balance of his account. The house of lords held, affirming the judgment of the court below, that the sureties were not liable, and were liberated from their obligation at the end of the first year. They farther held, reversing the judgment of the court below, that although at the end of the first year there was a large balance on the account-current against the principal debtor, still it was extinguished by subsequent remittances made by him, and that as the ultimate balance arose on posterior transactions, the sureties were not liable for that balance.

3. In the case of *Pemberton v. Oakes*, 4 Russell, 154, the partners of a banking firm were empowered to bequeath their shares in favour of their children. One of the partners died, and bequeathed his share in the concern to his executors in trust for his children, who interfered in the management, and [\*688] shared in the profits. It was held that a new partnership was thus formed, and that a contract of surety to the original firm did not extend to sums advanced to a customer by the new firm, and farther, that the balance due at the dissolution of the old firm was to be considered as discharged by the payments subsequently made by him. Lord ELDON observed,—“The first question is upon the meaning of the guarantee. Does it apply to advances made to Stokes by a new partnership,—by a partnership consisting of another person, or other persons, in addition to the members who constituted the partnership in January, 1812, or the survivors of them? The guarantee is expressly stated to be ‘for all sums of money not exceeding £20,000, which were then or should afterwards become due from Stokes to Harding, Oakes, and Willington, and the survivors or survivor of them, or the executors, or administrators of them, of such survivor.’ It is therefore clear, on the legal construction of the instrument, that it does not apply to the case of advances made by a partnership consisting of Oakes, Willington, and another person, who was not a member of the firm on the 4th January, 1812. The next question is, has there been a new partnership? By the articles Harding had the power of bequeathing or assigning his share of the business and the future profits after his death, to, or in trust for his wife or children. Accordingly, by his will he gave his share of the business, and the future profits, to his executors in trust for his children. In a question of this kind the trust is wholly immaterial. The bequest conveys the legal interest in the partnership to certain persons. These individuals assist and take, or at least there is one of them who assists and takes a principal share in the management of the concern. According to the admissions in the answer and affidavits they share in the profits, and all this is confirmed by a reference to the partnership books in which there is a profit and loss account, showing that profits had been realized every year. I must therefore hold, that upon the death of Harding his widow and the other executors became partners with Willington and Oakes in this banking concern.”

\*ALTHOUGH AFTER A CHANGE IN THE COMPOSITION OF A BANKING FIRM, THE SUBSEQUENT OPERATIONS OF A CUSTOMER MAY [\*689] HAVE BEEN ENTERED IN THE BOOKS OF THE FIRM AS FORMING PART OF ONE ACCOUNT, IF THE ACCOUNT HAS NOT BEEN SO RENDERED TO THE CUSTOMER, THE NEW FIRM ARE NOT PRECLUDED FROM AFTERWARDS SEPARATING THE ACCOUNT, AND RENDERING ONE PORTION OF IT AS APPLICABLE TO THE OLD, AND THE OTHER AS APPLICABLE TO THE NEW FIRM, SO AS TO MAKE A GUARANTEE POSSESSED BY THEM COVER THE BALANCE DUE BY THE CUSTOMER AT THE DATE OF THE CHANGE IN THE FIRM.

## SIMSON v. INGHAM.

June 10, 1823.—E. 2 B. & C. 65. Eng. Com. Law Reps., vol. 9.

THIS was an action against the defendants as heirs and devisees of Benjamin Ingham deceased, on a bond, bearing date the 19th October, 1808, whereby Benjamin and Joshua Ingham, since deceased, therein described as late of Huddersfield, bankers, became bound in the penal sum of £20,000, to one P. C. Bruce; and the three plaintiffs, Simson, Stephenson, and Freen, therein described as bankers in London, carrying on business under the firm of Were, Bruce, Simson, and Co. The condition of the bond was, that B. and J. Ingham should well and truly remit and pay to the said P. C. Bruce, Simson, Stephenson, and Freen, or any of them, associated or not with any other person or persons in the same or any firm, the amount of all such sums as B. and J. Ingham, or either of them, associated with any other person or persons or not, should draw on the said Bruce, Simson, Stephenson, and Freen, or any of them, associated or not as aforesaid, or make payable at their house, as the said bills or notes should become respectively due. There then followed other clauses, usual in such bonds, for payment of all moneys, paid, laid out, and expended by the London bankers, on account of the country bankers, or due from the latter to the former, upon any account whatever.

The defendants pleaded separately, and admitted the execution of the bond by Benjamin Ingham, and set out the estates which they severally took under the obligor, which the plaintiffs confessed to be accurately set out. The plaintiffs suggested \*breaches of the condition of [\*690] the bond, and the writ of inquiry came on to be executed before the lord chief justice, at the London sittings after Easter Term, 1822, when the amount of the damages was referred to Mr. Gaselee, who, by his award reciting the bond and the order of reference, assessed them at £13,845, but stated the following facts for the opinion of the court.

The obligors are bankers at Huddersfield; the obligees their London correspondents. At the date of the bond, and from thence to the 1st January, 1809, the Huddersfield bank was carried on by the obligors alone. On that day John Ikin was taken into the firm, and it so continued until the 14th September, 1811, when Benjamin Ingham died. The two survivors carried on the Huddersfield bank till January, 1814, when Joshua Ingham died. From the time Ikin was taken into the

partnership until and at the death of Joshua, the firm was called Messrs. Benjamin and Joshua Ingham and Co. The house of Bruce, Simson, and Co. was carried on by the four obligees till the 31st December, 1808, when Stephenson retired. The other three continued by themselves till the 1st January, 1811, when they took in Harry Mackenzie; and it was continued by Bruce, Simson, Freen, and Mackenzie till after the death of Joshua Ingham. During the latter period this firm was sometimes called Bruce, Simson, and Co., and sometimes Bruce, Simson, Freen, and Co. The house of Bruce and Co. were in the habit of sending to the Huddersfield bank monthly statements of their accounts. Such statements were generally sent within the first ten or twelve days of the succeeding month; and were, on their arrival at Huddersfield, examined, and the sums ticked by a clerk of that bank, and also looked over by Ikin, to whom the Inghams chiefly left the management of the business. The last statement, sent previously to the death of Benjamin Ingham, was for the month of August, 1811, and was sent on the 11th of September in that year. The balance of that account was £23,671, 3s. 2d. in favour of Bruce and Co. On the 16th September, when the news of Benjamin Ingham's death reached Bruce and Co, the balance in their favour was £22,723, 5s. 3d. On the 14th, the day on which Benjamin [691] Ingham died, it was something less; but on the 16th had increased to the above sum by the addition of some bills for which the Inghams had had credit, and which were returned on that day dishonoured. No alteration in the account was made in the books of Bruce and Co. immediately on the death of Benjamin Ingham; but, during the residue of the month of September and a part of the month of October, the remittances made by the Huddersfield bank, and the payments made by Bruce and Co. on their accounts, were entered in continuation of the former account. The remittances and payments during that time were nearly equal, and both far exceeded the balance due at the death of Benjamin Ingham; and if by having thus continued the account Bruce and Co. are to be considered as having made an election from which they are not at liberty to depart, and bound to apply the earliest remittances in discharge of the former balance, the damages are to be only nominal. Before, however, any account was transmitted to the Huddersfield bank subsequent to that for August, Bruce and Co., in consequence of a communication with their solicitor, opened a new account in their books, and in that inserted all the remittances and payments made subsequent to the death of Benjamin Ingham, striking them out of the former account, and retaining in the old account only the bills for which, as before stated, credit had been given, but which had been returned dishonoured; and on the 13th November, 1811, they transmitted to the Huddersfield bank statements of two accounts, each of which, instead of comprising as formerly the transactions of a single month, contained those of two, viz., September and October, no account of September separately having been sent.

The first of these accounts was thus entitled:—"Debtors Messrs. B. and J. Ingham and Co., (old account,) in account with Bruce, Simson, and Co., creditors." The first item on the debit side of this account



was the former balance of £23,671, 3s. 2d., and it contained the remittances and payments in September up to the death of Benjamin, and the bills returned on the 16th, making the above balance of £22,723, 5s. 3d. Under this was a similar list of bills returned dishonoured in October, which increased the balance to £23,118, 13s. The second account was in the same form, but entitled "new \*account," and the word [692] Freen was introduced after Simson. This account began on the 16th September, without any balance brought forward, and contained the remittances and payments made during that month, subsequent to the death of Benjamin, and also those made in the month of October. The balance of that account, at the end of September, was £965, 15s. 8d. in favour of the Huddersfield bank; but at the end of October was £242, 12s. 7d. in favour of Bruce and Co. These accounts were examined and ticked in the usual manner by the clerk of the Huddersfield bank. From this time the old and new accounts were kept separate in the books of Bruce and Co.; the addition to the former being little, if anything, more than the interest at the end of every six months, except in the month of July, 1813, when a transfer was made from the new account to the old of £15,507, 18s. 10d., which reduced the balance of the old to £10,000. Statements of these two accounts continued to be from time to time transmitted by Bruce and Co. to the Huddersfield bank, and examined and ticked in the usual manner, except that the statement of the old account was only sent at the end of every six months. The Huddersfield bank do not appear to have ever objected to the accounts being kept separately by Bruce and Co., although in their own books they only kept one account. The arbitrator being of opinion that, under these circumstances, the balance due on the death of Benjamin Ingham was not wholly discharged, assessed the damages at the sum above awarded; but if the court should be of opinion that the damages ought only to be nominal, then he directed that they should be reduced to the sum of one shilling. Upon the motion for a rule to reduce the damages to one shilling, in last Michaelmas Term, the court ordered that the award should be turned into a special case.

*Campbell* for the plaintiffs.—The remittances after Benjamin Ingham's death having been made generally, the plaintiffs had a right to appropriate them to the debts contracted by the new firm. In Clayton's case, 1 Merivale, 572; Bodenham v. Purchas, 2 B. and A. 39; and Brooke v. Enderby, 2 B. and B. 70, the expressions of the judges have reference to the fact of there having been one continuous account for all the transactions \*before and after the change of the firm. This [693] is evidence of the party receiving the money having applied it to the payment of the earliest items of the account. But it is impossible to contend that a rest may not be made and a new account opened. The deceased or retiring partner may be indebted to the partnership, and there can be no right that the old debt should be satisfied by money of the remaining partners. The question here must therefore turn upon the effect to be given to the entries in the plaintiffs' books before the new account was opened. But these entries never having been communicated, would have been no evidence of an appropriation for the plain-

tiffs themselves, and are to be considered as of no validity with respect to others. *Manning v. Western*, 2 Vern. 607; *Cox v. Troy*, 5 B. and A. 474. The meaning of an appropriation by the receiver at the time of payment is, that he shall appropriate on the first occasion of there being any communication between him and the payer, and this course was here pursued; for in the first account rendered after Benjamin Ingham's death, the subsequent payments were appropriated to the new debt, and the old debt remains unsatisfied. He was then stopped by the court.

*F. Pollock, contra.*—The London bankers were bound to apply the payments at the time of receiving them. That is expressly laid down by the master of the rolls in *Clayton's case*, 1 Mer. 604. After observing that the rule with regard to the option given in the first place to the debtor, and to the creditor in the second, was taken from the civil law, he proceeds to state, that according to that law, the election was to be made at the time of payment, as well in the case of the creditor as in that of the debtor; and he then cites the words of the civil law,—“*in re præsentî; hoc est statim atque solutum est; cæterum postea non permittitur,*” Dig. lib. 46, tit. 3, qu. 1, 3. The rule laid down refers to an act of appropriation to be done either by the party paying or receiving the money. The party paying money is bound to communicate his intention that it shall be applied in payment of a particular debt to the party receiving it; for otherwise the right of appropriation would devolve [\*694] upon the creditor. The very act of communicating \*the intention is the act of appropriation. But where a creditor receives money without any appropriation by the debtor, the right of applying it in payment of any one of several debts devolves on the former. The appropriation is an act to be done by him only, and it is unnecessary that it should be communicated to the debtor; for the latter not having made his election in the first instance, has no right to dissent from the appropriation made by the creditor. Here, therefore, the London bankers did, at the time of receiving the several payments, make the appropriation by entering them in their own books to the account of the old firm. The making of these entries constituted the act of appropriation; and having once done that act, they had no right to make any alteration in the account, especially to the prejudice of the heirs and devisees of B. Ingham, who are mere sureties for any debts contracted by the new firm since his death.

BAYLEY, J.—The general rule is, that the party who pays money has a right to apply that payment as he thinks fit. If there are several debts due from him, he has a right to say to which of those debts the payment shall be applied. If he does not make a specific application at the time of payment, then the right of application generally devolves on the party who receives the money. But there is a third rule, viz., that where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and the new firm in one entire account, then the payments made from time to time by the surviving partners must be applied to the old debt. In that case, it is to

be presumed that all the parties have consented that it should be considered as one entire account, and that the death of one of the partners has produced no alteration whatever. In this case the partner died in September, 1814. If, in the ordinary course of business, in October, 1814, a monthly account had been sent in, stating the transactions before and after the death of the partner as forming part of one entire account, and the balance as due from the survivors; in that case the creditor would have been precluded, and would have had no right to have said that the \*payments made subsequently to the death of the partner should be applied to any but the old account. In fact, the [\*695] bankers in London did not send in any account after the death of the partner until November, and then they sent in two distinct accounts, one made up to the day of the death of the partner, and the other commencing from that period. At that time, therefore, the bankers in London expressed their dissent from making the whole one entire account. It has been insisted that at that period of time they had no right so to do, because they were precluded by the entries which they had already made in their own books in the intermediate space of time. If, indeed, a book had been kept for the common use of both parties as a pass-book, and that had been communicated to the opposite party, then the party making such entries would have been precluded from altering that account; but entries made by a man in books which he keeps for his own private purposes, are not conclusive on him until he has made a communication on the subject of those entries to the opposite party. Until that time he continues to have the option of applying the several payments as he thinks fit. For these reasons I am of opinion that the plaintiffs were not precluded from applying the payments to the new account, and therefore that this award is right.

HOLROYD, J.—I am also of opinion that in this case the award is right. The persons paying the money not having made any direct application of it, the right of making such application devolved on the receivers; and if they have done no act which can be considered as such an application, it is equally clear, that although they did not apply it at the moment of payment they would have a right to make the application at a subsequent period. The question therefore is, Whether from any entry in the books there appears to have been a complete election by them to apply the payments in any other way than they are applied in the accounts which have been actually delivered? Now, those entries not having been communicated to the opposite party, it seems to me that the election was not complete. The effect of making the entries in their own private books, shows only that the idea of so applying the payments \*had passed in their own minds. It is much the same thing as [\*696] if they had expressed to a stranger their intention of making such application of the payments, and had afterwards refused to carry such intention into effect. In the case of *Cox v. Troy*, a party who had written his acceptance with the intention of accepting a bill, afterwards changed his mind, and before it was communicated to the holder, or the bill delivered back, obliterated his acceptance; and it was held that the acceptance was not complete. That case is very similar to the present;

for the drawer of the bill there, by writing his acceptance on it, had expressed an intention to accept, yet it was held not to be a complete acceptance until it was communicated to the holder. So in this case the entries made in the banker's books could not amount to an election by them to appropriate the sums to a particular account until those entries were communicated to the opposite party. That being so, I am of opinion that the bankers are not bound by those entries; and therefore that the award is right.

BEST, J.—Clayton's case is altogether unlike the present. He had money in the banking-house at the time of Devaynes's death, and afterwards paid in more money, which was blended in the same account. It was on the ground that the accounts were so blended that the master of the rolls decided that case. He thought there was no other appropriation than what arose from the order in which the receipts and payments took place, and according to that order the money lodged in the house in Devaynes's lifetime was first paid. In this case the payments after the death of Benjamin Ingham are appropriated by the rendering of the accounts, in which credit is given for them to the surviving partners from whose hands these payments came. But it is said that this application of the money was made too late, and after the plaintiffs were precluded from so applying them by their having previously entered them to the credit of the old firm. It is true that Sir William Grant says, in Clayton's case, that by the civil law the application is given first to the debtor, and then to the creditor, and that as well the creditor as the debtor must make his election at the time of payment; and that unless [\*697] such election be immediately made, \*the law will appropriate it in discharge of the most burthensome, and if all are equally burthensome, of the oldest debts. But according to the cases there cited our law does not require from the creditor an instant decision. I think that he has a reasonable time to decide, to which account he will place a sum that has been paid him without any application of it by his debtor, and more than a reasonable time has not been taken by the plaintiffs. When once the creditor has made his election he is bound by it. For the reasons given by my brothers, I think no election was made until the account was rendered to the Huddersfield bankers, and consequently that the award is right.

Judgment for the plaintiffs.

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A CONTRACT OF SUB-PARTNERSHIP DOES NOT SUBJECT THE SUB-PARTNER IN THE LIABILITY OF A PRINCIPAL PARTNER, AND THE EXTENT OF HIS LIABILITY WILL DEPEND ON THE TERMS OF THE SUB-CONTRACT.

### FAIRHOLM v. MAJORIBANKS.

Jan. 25, 1725.—S. M. 14558.

THE estate of Grange being sequestrated at the instance of the credi-

tors, the lords of session appointed the same to be set in tack, by public roup, for a certain number of years. Sir Robert Miln, Cornwall of Bonhard, and Bailie Clerk, upon the 4th of December, 1694, entered into articles for taking the aforesaid estate in farm, of the following tenor :—" That the said Robert Miln and Bonhard are to be two-thirds concerned in the whole estate of Grange, and the said George Clerk another third ; and both the said parties appoint Daniel Hamilton to offer the length of 11,000 merks for the same ; and thereafter the said George Clerk is to come the length of 13,000 merks, and not to exceed the same."

There was a postscript subjoined to these articles, dated the \*11th of December, in these terms :—" We allow Bailie George [\*698] Clerk to exceed the foresaid sum of 13,000 merks in 2000 merks more."

Of the same date with the first agreement, there was another writing entered into betwixt Bailie Clerk and John Marjoribanks, bailie of Edinburgh, in these terms :—" Whereas there is a minute passed betwixt Sir Robert Miln, Bonhard, and George Clerk, for the tack of Grange's estate, and that the said George is to have a third part ; therefore I declare, that I shall hold the half of his third part : " and this is signed by him. And on the back thereof it was writ thus :—" If you be straitened to bid more, though you go to 2000 merks more, as is contained within, I am content ; " and this is also subscribed.

In the month of February, 1695, George Clerk was preferred as the highest offerer at the roup ; and the tack being made out in his name, he gave a bond for the tack-duty, and Bailie Marjoribanks became his cautioner.

In consequence of this tack, Bailie Clerk, with consent of Bailie Marjoribanks, granted a factory to Daniel Hamilton for managing that estate.

Bailie Clerk having paid considerable sums on account of the loss upon the tack and likewise of the insolvency of Sir Robert Miln and Bonhard, Mr. Fairholm, as the Bailie's assignee, insisted against the defender, as representing Bailie Marjoribanks his father, for payment of one-half of the whole loss sustained by Clerk.

It was pleaded in defence of Mr. Marjoribanks, that his father not being bound in the original copartnery with Sir Robert Miln, Bonhard, and Bailie Clerk, he could not be liable any farther than his limited engagement with Bailie Clerk ; and as he could only have drawn a sixth part of the profit, or a half of what belonged to Clerk, so he could only be liable for a sixth part of the loss ; which defence, he alleged, was founded both in the tenor of the writs and intention of parties, and likewise \*supported by the rule of law, "*Socius mei socii meus socius non est.*" As also, by the 19th, 21st, 22d, and 23d laws, D. [\*698] *pro Socio.* "*Qui admittitur socius ei tantum socius est qui admisit, et recte, cum enim societas consensu contrahatur, socius mihi esse non potest quem ego socium esse nolui ; quid ergo si socius meus eum admisit ei soli socius est.*"

To which it was answered for the pursuer, 1mo, That it appeared plainly from the several dates of the articles betwixt Bailie Marjoribanks  
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and Bailie Clerk, and between him and the other copartners, that it was one society, and that Bailie Marjoribanks certainly understood it so himself, when he concurred in granting a factory with Bailie Clerk, and signed instructions to the factor. 2do, Supposing that Bailie Clerk was (strictly speaking) only partner with Sir Robert and Bonhard, yet seeing he communicated the minute of copartnery to Mr. Marjoribanks, and apprised him of the persons with whom he was to deal, and Mr. Marjoribanks had acceded and taken a share of Bailie Clerk's interest in the copartnery, he must necessarily be subject to the half of the losses that Clerk was liable to any manner of way, and equally answerable with Mr. Clerk for the loss arising from the failure of Sir Robert and Bonhard, that being part of the risk arising from Mr. Clerk's engagement in the copartnery; for equity required, as well as the nature of their society, that Bailie Marjoribanks, who was to have the half of the profit upon the third share, ought to bear the half of the burdens that attended it, profit and loss going always in the same proportion. Nor was it of any moment, that Bailie Marjoribanks could draw no more than a sixth part of the profit; for in this his condition was equal with Bailie Clerk's; and seeing Clerk had become the principal tacksman for the whole, law could never interpret that he could draw less profit, or bear a greater loss than that partner who had undertaken to bear the half of his third.

It was replied for the defender, that Bailie Marjoribanks having subscribed a separate minute with Bailie Clerk, and upon the same day that Clerk had entered into his agreement with the other partners, it showed [\*700] plainly that Bailie Marjoribanks \*had industriously avoided being in society with the other two. It was replied to the second, That this transaction did properly consist of two separate contracts, which had in law very different effects; the one a contract of location, the other of society. As to the society, Bailie Marjoribanks had no concern in it; for what he engaged to hold was plainly the half of Clerk's third to the tack, and consequently he was only liable for his share of what loss arose from that, but not for any part of the loss which Bailie Clerk sustained through his being in society with Sir Robert Miln and Bonhard.

The lords found, "That Bailie Marjoribanks was no partner with Sir Robert Miln and Bonhard; and found, that Bailie Marjoribanks was only liable for a sixth part of the loss of the whole subject of the tack."

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1. In *Ex parte Barrow*, in the matter of *Slyth*, 2 Rose, 252, Lord ELDON, chancellor, observed,—“Now *Slyth* the son was no partner in this partnership; for although *Slyth* the father might be obliged to give one-third of his profits to *Slyth* the son under this agreement, yet I take it to have been long since established that a man may become a partner with A. where A. and B. are partners, and yet not be a member of that partnership which existed between A. and B. In the case of Sir Charles Raymond, a banker in the city, a Mr. Fletcher agreed with Sir Charles Raymond that he should be interested so far as to receive a share of his profits of the business, and which share he had a right to draw out from the firm of Raymond and Co. But it was held that he was no partner in that partnership, had no demand against it, had no account in it, and that he

must be satisfied with a share of the profits arising and given to Sir Charles Raymond."

2. Where a party procures another to hold shares in a copartnership for him, and undertakes to pay the deposits, and all the calls upon them, though not the ostensible, he is held to be the real partner, and is held subject to all the liabilities of a partner. In *Goddard v. Hodges*, 3 Tyr. 209, the solicitor of a company for building a bridge asked a party, Fale, to allow him to use his name for the purpose of holding shares in the company, and promising to pay the deposits, and every other claim in respect of \*them. The solicitor afterwards [\*701] sued the company for payment of his account, and the question came to be whether he was a partner of the company or not, for if he were so he was not entitled to recover. The court held that as the shares were held by Fale for behoof of the plaintiff, the latter was the real partner. Lord LYNCHBURST observed,—“Fale's name was registered, and he held the receipt for advances on ten shares, so that he became ostensibly a member of the company; but I am of opinion that the plaintiff became really a partner in the concern, and liable to its debts. I consider that Fale acted merely as an agent to the plaintiff, and that the case is the same as if the plaintiff's own name had been registered in the company's books.” BAYLEY, B., observed,—“Is the plaintiff a partner in the company or not? In such a concern as this there is no anxiety as to the description of persons who shall become partners, or whether particular parties shall be admitted or excluded. Every man who signs and pays money becomes a partner. The plaintiff stands in a situation in which the step of taking his shares in his own name, so as to become an ostensible partner, might prejudice him with the other members of the company, or might be thought by him likely to produce that effect. But is he not a real partner? Under the circumstances, as arranged between him and Fale, every benefit accruing to Fale in respect of the shares would be received by him to the plaintiff's use. If a loss should happen it would be most unjust as between Fale and the plaintiff that the former should contribute to bear it. The agreement in fact was, that Fale should be the nominal, and the plaintiff the real partner.”

## CONTRACT OF INSURANCE.

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WHERE A PARTY EFFECTS AN ASSURANCE ON THE LIFE OF ANOTHER, IS HIS RIGHT TO RECOVER UPON THE POLICY LIMITED BY HIS INTEREST IN THE LIFE AT THE TIME OF EFFECTING THE ASSURANCE, OR AS IT EXISTS AT THE DEATH OF THE PARTY ON WHOSE LIFE THE ASSURANCE IS EFFECTED, OR AS IT EXISTS AT THE TIME OF THE ACTION BEING BROUGHT?

### I.—GODSALL v. BOLDERO.

Nov. 25, 1807.—E. 9 East, 71.

THIS was an action of debt on a policy of insurance made the 29th of November, 1803, under seal of the defendants, as three of the directors of the Pelican Life Insurance Company, on behalf of the company; which recited that the plaintiffs, coachmakers in Long Acre, being interested in the life of the Right Hon. William Pitt, and desirous of making an insurance thereon for seven years, had subscribed and delivered into the office of the company the usual declaration setting forth his health and age, &c., and having paid the premium of £15, 15s. as a consideration for the assurance of £500 for one year from the 28th of November, 1803, it was agreed that in case Mr. Pitt should happen to die at any time within one year, &c., the funds of the company should be liable to pay and make good to the plaintiffs, their executors, &c., within three months after his demise should have been duly certified to the trustees, &c., the sum of £500. And further, that that policy might be continued in force from year to year until the expiration of the term of seven years, provided the annual premium should be duly paid on or before the 28th [704] of November in each year. \*The plaintiffs then averred, that at the time of the making of the said assurance, and from thence until the death of Mr. Pitt, they were interested in his life to the amount of the sum insured; and that they duly paid the annual premium of £15, 15s. before the 28th of November, 1804, and the further sum of £15, 15s. before the 28th of November, 1805; and that after that day, and while the assurance was in force, and before the exhibiting the bill of the plaintiffs, viz., on the 23d of February, 1806, Mr. Pitt died; that his



demise was afterwards duly certified to the trustees, &c. ; since when more than three months have elapsed before the commencement of this suit, &c.'; but that the £500 has not been paid or made good to the plaintiffs. There were also counts for so much money had and received by the defendants to the plaintiffs' use, and upon an account stated. To this the defendants pleaded, 1st, *nil debent* ; 2dly, That the plaintiffs, at the time of making the assurance, and from thence until the death of Mr. Pitt, were not interested in his life in manner and form as they have complained, &c. ; 3dly, As to the first count, that the interest of the plaintiffs in the policy, and thereby intended to be covered, was a certain debt of £500 at the time of making the policy, due from Mr. Pitt to the plaintiffs, and no other ; and that the said debt afterwards, and after the death of Mr. Pitt, and before the exhibiting of the plaintiffs' bill, to wit, on the 6th of March, 1806, was fully paid to the plaintiffs by the Earl of Chatham and the Lord Bishop of Lincoln, executors of the will of Mr. Pitt. Issues were taken on the two first pleas ; and as to the last, the plaintiffs, protesting that their interest in the policy thereby intended to be covered was not the said debt mentioned in that plea to be due to them from Mr. Pitt, and no other ; replied, that the said debt was not afterwards, and after the death of Mr. Pitt, and before the exhibiting of their bill, fully paid to them by the Earl of Chatham and the Lord Bishop of Lincoln, executors of Mr. Pitt, in manner and form as alleged, &c., on which also issue was joined.

The defendants paid £31 into court upon the first count ; and on the trial of the cause before Lord Ellenborough, C. J., at Guildhall, it was agreed that a verdict should be entered on \*the several issues, according to the direction of the court, on the following case re- [\*705]  
served.

The policy mentioned in the declaration was duly executed, and the premiums thereon were regularly paid. Mr. Pitt, mentioned in the policy, died on the 23d of January, 1806, which event was duly certified in February, 1806, to the trustees of the Pelican Life Insurance Company. The defendants, before Trinity Term last, were served with process issued in this cause on the 3d of June, 1806. Mr. Pitt was indebted to the plaintiffs at the time of the execution of the policy, and from thence up to and at the time of his death above £500, and died insolvent. On the 6th of March, 1806, the executors of Mr. Pitt paid to the plaintiffs out of the money granted by parliament for the payment of Mr. Pitt's debts, £1109, 11s. 6d., as in full for the debt due to them from Mr. Pitt. The case was argued in the last Term by

*Dampier*, for the plaintiffs, who contended that they were entitled to recover upon this policy, notwithstanding the payment of the debt to them by Mr. Pitt's executors out of the money granted by parliament for that purpose. It is clear that a creditor has an insurable interest in the life of his debtor, and the amount of the debt is the measure of that interest ; and so far the existence and legality of the debt is necessary to the validity of the insurance in point of interest under the Stat. 14 Geo. III. c. 48 ; but it is not the debt, *qua* debt, which is insured, but the life of the debtor ; it is only necessary that the interest should exist

at the time of the insurance made, and continue up to the time of the death of the debtor, as it did in this case; and the sum insured having then become due, and the debtor's estate insolvent, the fact of payment of the debt afterwards by a third party cannot be material; such payment being altogether gratuitous. The validity of the insurance depends upon its agreement with the Stat. 14 Geo. III. c. 48, which was made to prevent "insurances on lives or other events wherein the assured shall have no interest;" and for this purpose it enacts, (sect. 1,) "that no insurance shall be made by any persons on the life of any person, &c., [706] wherein the persons \*for whose use, benefit, or on whose account such policy shall be made, shall have no interest, or by way of gaming or wagering; and it avoids every assurance made contrary to the true intent and meaning thereof. The 2d section prohibits the making any policy on the life of any person, without inserting in it the person's name interested therein. And the 3d section provides that "in all cases where the insured hath interest in such life, &c., no greater sum shall be recovered from the insurers than the amount or value of the interest of the insured in such life," &c. Now here it cannot once be disputed but that all the requisites of the act have been complied with. The only question which can be made is upon the third section, as to the necessity of the interest continuing beyond the time of the event happening on which the insurance is stipulated to be paid, and to the commencement of the action. But the interest need only continue up to the happening of the event insured, when the cause of action arises; and that this is the usual averment in actions of this sort; and the defendants by their third plea admit that it continued beyond that time; for they allege that the debt was paid after Mr. Pitt's death, though before the action commenced. But if it had been necessary that the interest should endure up to the time of the action brought, that should have been averred, which has not been usual, and for want of which the judgments in former cases might have been arrested. The hazard was run for which the premium was received during Mr. Pitt's life; and as he died insolvent there was then as it were a total loss; then the underwriters' liability cannot be adeemed by the voluntary payment of a third party though through the hands of the debtor's executors. The very payment of the premium gave the plaintiffs an interest in the policy; and it could not have been in the contemplation of the legislature when they granted the money for the payment of Mr. Pitt's debts to adeem the risk of underwriters. In the case of insurances against fire, it never was conceived that the insurers could avail themselves *pro tanto* of charitable donations collected for the benefit of the sufferers. In the case of a life insurance, the premium is not calculated upon the risk of the insolvency of the person whose life is insured, but solely on the probability of the duration of the life. [707] \*But if the defendants' objection be well founded; every case of the sort will be resolved into an examination of the assets; of which the insurers will avail themselves *pro tanto*, after having had the benefit of the whole premium; and this, too, at any distance of time when assets may be forthcoming after the payment of the loss. But, secondly, by the payment of money

into court the defendants admit a continuance of the plaintiffs' interest on the policy beyond the amount of the bare debt, for it was paid in after the liquidation of the debt, and after the action commenced. And therefore the plaintiffs would be entitled to recover something; and it does not appear how the premiums received have been reduced to the amount paid into court.

*Marryat*, contra, said that he should not now dispute the proposition, that a creditor might insure the life of his debtor since the statute; though it might have been doubted at first, whether such an interest as that in the life of another were within the contemplation of the legislature. There was an inception of the risk on the policy; and therefore the premium was properly paid; and no question can arise on the amount of it; this being an insurance on a precise sum, like a valued sea policy. The only question is, Whether in the event the plaintiffs have been damnified, and can call upon the assurers for any indemnification? To pursue the metaphor; the ship insured has been wrecked, but there has been a salvage, which the underwriters were entitled to, and out of which the assured have been indemnified, notwithstanding which they still claim as for a total loss; contrary to the very nature of the insurance, which is only a contract of indemnity. Admitting that the general form of the declaration in these cases may have been such as is stated; still it is competent for the underwriters to show that a salvage has been received by the assured to the whole extent of their loss; and in no case can an assured recover double satisfaction whether from the same or any other person; as in the case of a double insurance; and therefore it is immaterial in this case from what hand the first satisfaction came. This principle was fully admitted in the case of *Bird v. Randall*, 3 Burr. 1345; 1 Blac. 373, 387; where it was applied to a case \*much stronger than the present. For there a servant having entered [\*708] into articles to serve his master for a certain time under a penalty, and the servant having left his service before the time by the procurement of the defendant, this court, in an action by the master to recover damages against the seducer, held that the master's having before sued the servant and recovered the penalty against him before the action brought against the seducer, (though in fact the penalty recovered was not received till after the second action commenced, but before trial,) was a bar to such further remedy, considering the amount of the penalty as ample compensation for the injury received; and that no further satisfaction could be received from any other quarter. [Lord ELLENBOROUGH, C. J.—I never could entirely comprehend the ground on which that case proceeded. It was assumed that the sum taken as the penalty from the servant was the extreme limit of the injury sustained by the master; but there is the doubt; for the penalty might have been so limited, because of the inability of the servant to undertake to pay more; and yet it might have been very far from an adequate compensation to the master for the injury done to him by another who seduced his servant from him. I remember, however, a similar case tried at the sittings in the Court of Common Pleas before Mr. Justice Wilson, sitting for the chief-justice, who ruled the same point upon the dry authority of the

former decision; but, as it seemed to me at the time, with considerable doubt upon his mind as to the propriety of it. LAWRENCE, J.—I suppose the court proceeded upon the ground that the penalty was by the express stipulation of the parties made an equivalent for the loss of the service. Lord ELLENBOROUGH.—That is so as between the parties themselves; but it may admit of doubt, whether that were the fair way of considering it as against a stranger a wrong-doer.] A voluntary payment of another's debt, if accepted as such, will protect the debtor; and if so, it will equally protect an insurer under the statute. For the object of that was to prevent wager policies, but if this policy may be enforced, notwithstanding payment of the debt, every creditor may gamble upon the life of his debtor by way of insurance, though without any reason to doubt of his solvency; and upon his death he would be entitled to double [\*709] \*satisfaction of his debt. If a payment out of the debtor's assets would have been a bar to this action, it cannot enter into the merits of the case to inquire by whose assistance the executors have been enabled to make the payment. The money was paid by them, and received by the plaintiffs, as for the debt of Mr. Pitt. Then 2dly, the payment of money into court on the first count only admits the contract declared on. It admits that the plaintiffs had an interest in the policy up to the death of Mr. Pitt, but not at the time of the action brought; and where a demand is illegal on the face of it, payment of money into court does not admit it. *Cox v. Parry*, 1 Term Rep. 464, and *Ribbans v. Cricket*, 1 Bos. and Pull. 264. [It was afterwards stated by the court, and agreed on all hands that the payment of money into court on the first count only admitted the facts stated in that count.]

*Dampier*, in reply, on the principal question, said that the facts of the case showed that this was not a wagering policy; but that the plaintiffs had an interest in it up to the extent of the sum insured. And denied that the subsequent payment of the debt out of the grant of parliament was like the case of salvage on a marine policy; for that was an advantage calculated upon by the underwriters in fixing the amount of the premium; but here the solvency of the debtor formed no basis of the calculation, but only the probable duration of his life. In *Bird v. Randall*, (besides the doubt of the soundness of that decision,) the penalty was considered as liquidated damages to the full extent of the injury; and the judgment recovered was considered as a satisfaction in law. If in this case the plaintiffs, after recovering judgment against the underwriters, had attempted to sue Mr. Pitt's executors, the cases would have been more like. This stands as the case of a gratuitous payment by third persons of the debt of another, and not as the satisfaction of a legal demand, nor upon a stipulation to receive it as satisfaction of the present claim. It is most like the case of a charitable donation to sufferers by fire who were partially insured.

*Cur. adv. vult.*

[\*710] \*Lord ELLENBOROUGH, C. J., now delivered the judgment of the court.

This was an action of debt on a policy of insurance on the life of the late Mr. Pitt, effected by the plaintiffs, who were creditors of Mr. Pitt

for the sum of £500. The defendants were directors of the Pelican Life Insurance Company, with whom that insurance was effected. [His lordship, after stating the pleadings and the case, proceeded]—This assurance, as every other to which the law gives effect, (with the exceptions only which are contained in the 2d and 3d sections of the Stat. 19 Geo. II. c. 27,) is in its nature a contract of indemnity, as distinguished from a contract by way of gaming or wagering. The interest which the plaintiffs had in the life of Mr. Pitt was that of creditors; a description of interest which has been held in several late cases to be an insurable one, and not within the prohibition of the Stat. 14 Geo. III. c. 48, § 1. That interest depended upon the life of Mr. Pitt, in respect of the means, and of the probability of payment which the continuance of his life afforded to such creditors, and the probability of loss which resulted from his death. The event against which the indemnity was sought by this assurance, was substantially the expected consequence of his death as affecting the interests of these individuals assured in the loss of their debt. This action is, in point of law, founded upon a supposed damnification of the plaintiffs, occasioned by his death, existing and continuing to exist at the time of the action brought; and being so founded, it follows of course, that if, before the action was brought, the damage, which was at first supposed likely to result to the creditors from the death of Mr. Pitt, were wholly obviated and prevented by the payment of his debt to them, the foundation of any action on their part, on the ground of such insurance, fails. And it is no objection to this answer, that the fund out of which their debt was paid did not (as was the case in the present instance) originally belong to the executors, as a part of the assets of the deceased; for though it were derived to them *aliunde*, the debt of the testator was equally satisfied by them thereout; and the damnification of the creditors, in respect of which their action upon the assurance contract is alone maintainable, was fully obviated before \*their action was brought. This is agreeably to the doctrine of Lord Mansfield in *Hamilton v. Mendes*, 2 Burr. 1210. The [\*711] words of Lord Mansfield are, “The plaintiff’s demand is for an indemnity; his action, then, must be founded upon the nature of the damnification, as it really is at the time the action is brought. It is repugnant, upon a contract for indemnity, to recover as for a total loss, when the event has decided that the damnification in truth is an average, or perhaps no loss at all.” “Whatever undoes the damnification in the whole, or in part, must operate upon the indemnity in the same degree. It is a contradiction in terms, to bring an action for indemnity, where, upon the whole event, no damage has been sustained.” Upon this ground, therefore, that the plaintiffs had in this case no subsisting cause of action in point of law, in respect of their contract, regarding it as a contract of indemnity at the time of the action brought, we are of opinion that a verdict must be entered for the defendants on the first and third pleas, notwithstanding the finding in favour of the plaintiffs on the second plea.

## II.—DALBY v. THE INDIA AND LONDON LIFE ASSURANCE COMPANY.

Dec. 2, 1854.—E. 18 Jurist, 1024.

THIS was an action brought by the plaintiff, suing on behalf of the Anchor Life Assurance Company, on a policy of assurance effected with the defendants upon the life of the late Duke of Cambridge. The declaration, which was in the usual form stated, *inter alia*, that the said Anchor Company effected an assurance with the defendants in the sum of £1000 on the life of the duke, for the whole term of his life, and had paid the premiums thereon; that the policy remained in force until the duke died; and that at the time of making the policy, and thence until the death of the duke, the Anchor Assurance Company was interested in his life to the amount so insured thereon as aforesaid, but the defendants had not paid the said sum.

[\*712] \*The defendants pleaded that the said Anchor Assurance Company was not interested in the life of the duke in manner and form as alleged, and issue was joined thereon.

The case was tried before Cresswell, J., at the sittings after Michaelmas Term, 1851, and resulted in a verdict for the plaintiffs.

After two arguments in the Court of Common Pleas, upon a motion for a new trial, the court directed the verdict to be entered for the defendants, and the case to be treated as if a bill of exceptions had been tendered to the ruling of Cresswell, J.; and the facts appearing on the bill of exceptions, so far as they are material, were the following:—

The Anchor Assurance Company had granted to the Rev. John Wright four policies on the life of the Duke of Cambridge, amounting together to the sum of £3000, Mr. Wright at that time being interested in the life of the duke to that amount. The said sum was to be paid to Mr. Wright on the death of the duke. The Anchor Company then effected the policy declared upon with the defendants for the sum of £1000, by way of cross or counter assurance to that amount, on the said life. Afterwards Mr. Wright surrendered the policies to the Anchor Company, in consideration of an annuity granted to him by that Company. Three of the policies were cancelled, but the one which had been effected with the defendants was kept in force by the payment of premiums on behalf of the Anchor Company until the time of the death of the duke. The defendants had never been informed of the policies having been surrendered or the annuity granted. The learned judge thereupon directed the jury, that upon the facts so proved, the said Anchor Company was not interested in the life of the said duke, as alleged in the declaration. This ruling was excepted to, and thereupon error was brought.

*Bramwell, Q. C.*, for the plaintiff in error.—The question in this case is, Whether the Anchor Assurance Company can by law enforce the payment of the sum insured with the defendants? The contract on the face of it is simple and absolute; it is not to make any loss good, or to

make compensation, \*but to pay a sum of money on the death of the party insured. Life assurance is a contrivance for accumulating. The insured cannot to a certainty save the sum which he requires, as he does not know how long he may live. He agrees to pay an annuity as long as he lives, if on his death the insurer will pay a certain sum. The assurance of another man's life is identically the same thing; the insured desires to be as well off at the death of that man as if he were now to realize the interest which he has in his life. No difference is made in the premiums whether the assurance be on one's own life or on the life of another. This is no contract of indemnity. The debt is not insured, nor does it become more separate than it was before assurance. [ALDERSON, B.—In fire and marine policies there may be no loss, but in life policies the loss must happen.] And when the loss does happen in the case of fire or marine policies, it is the actual loss that is to be paid, and no more. A life policy increases in value as the life goes on; not so with other policies. Instead of being called life assurance, it should be money assurance dependent upon life. [PARKE, B.—You say that it is what it purports to be, an engagement to pay a sum of money upon death, in consideration of the payment of a certain annuity. Such an assurance as this was perfectly good at common law. The only question arises under the Stat. 14 Geo. III. c. 48.] The cases collected in 1 Arn. Ins. 277, show that it was valid at common law. In *Cousins v. Nantes*, 3 Taunt. 512, it was held that at common law wager policies were valid. If it had not been so, the Stat. 19 Geo. II. c. 37, prohibiting marine assurance, "interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering," need not have been passed. This assurance being valid at common law, has the Stat. 14 Geo. III. c. 48, made any difference? It recites, "Whereas it hath been found by experience that the making assurances on lives or other events wherein the insured shall have no interest, hath introduced a mischievous kind of gaming;" and enacts, by section 1, that "No assurance shall be made by any person on the life of any person, or on any other event whatsoever, wherein the person for whose use, benefit, or on whose account such policy shall be made shall have no interest, or by gaming \*or wagering." Section 2 requires the names of the parties, interested to be inserted in policies; and by section 3 it is [\*714] enacted, that "in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events." Now, there is no gaming where the interest exists at the time of assurance, though it may afterwards cease; and such a case, therefore, is not within the mischief contemplated by the statute. The 3d section means that the insurer is not to recover any larger sum than the interest which he had at the time of making the contract. If not, suppose I have no interest at the time of contracting, but acquire one afterwards, I may recover it under that section; but it would be by way of gaming, and therefore prohibited. It is grossly unjust, that if a man owes me £1000, and I insure his life, and pay premiums for thirty years, when the policy has

acquired a saleable value, my debtor comes into property, pays me the debt, and I am to receive nothing from the Assurance Office. The case of *Godsall v. Boldero*, 9 East, 72, 2 Smith's L. C. 157, is not sound law. The judgment in that case assumes the whole question, and assumes it improperly, as though life assurance must be a contract of indemnity or one of wagering; but assurance on a man's own life is neither one nor the other. The only authority cited by Lord Ellenborough is *Hamilton v. Mendes*, 2 Burr. 1210, but that was an action on a marine policy, which expressly on the face of it stipulated for the case of a loss. The learned judge went so far as to say that the interest must continue until the commencement of the action. The judgment is founded not on the statute, but the common law, as stated in 2 Smith's L. C. 170, note. The doctrine established by *Godsall v. Boldero* is there said to have been recognised in *Ex parte Andrews*, in *re Emett*, 1 Mad. 573. There, however, the insured got his premiums, and it was a question of trust. [ALDERSON, B.—In that case the creditor was made trustee for the debtor, except as to his interest.] In *Barber v. Morris*, 1 Moo. and R. 62, Lord Tenderden, C. J., intimated an opinion that where the interest had [\*715] ceased, the payment of the policy could not be enforced. But \*there it was assumed that *Godsall v. Boldero* was law. *Henson v. Blackwell*, 4 Hare, 434, will be relied upon by the other side. [ERLE, J.—The judge there seems to have thought that the office need not have paid, but that if they did so it was as a donation. *Godsall v. Boldero* has prevailed all the cases upon the subject until the present time; but we are now in a court of error.] In *Ashley v. Ashley*, 3 Sim. 149, it was held, that where a life policy is assigned, it is not necessary that the assignee should have any interest. But the interest of the assignor having ceased, the assignee who has bought the policy cannot recover, if *Godsall v. Boldero* be law.

*Channell*, Serjt., for the defendants in error.—The interest in the life of the Duke of Cambridge must have been in the the Anchor Assurance Company at the time of the policy, in order that they should recover; and the same interest, or one of a similar character, must have continued until the death of the duke. With regard to fire and marine assurances, the interest must continue until the time of the loss. (*The Saddlers' Company v. Badcock and others*, 2 Atk, 554.) Before the Stat. 19 Geo. II. c. 37, considerable doubt existed whether a policy, "interest or no interest," was valid; it had been held at common law not to be illegal; but if not expressly stated to be "interest or no interest," it was understood that the insured was interested, and he was bound to prove it; and if his interest ceased before the loss he could not recover. *Godsall v. Boldero* was decided by four eminent judges, and has been adopted in many subsequent cases. Whether it is to be supported on the ground of indemnity, or of cessor of interest, it is sufficient for the defendants. The decision was long after the passing of the Stat. 14 Geo. III. c. 48, and the judgment must be understood as having proceeded upon it, That statute may have been declaratory of the common law. [PARKE, B.—The word "declared" is not used in it, so that it would not affect existing contracts.] If it had not been for *Schweiger and others v.*



Magee, 1 Cooke and Alc. Ir. Rep. 182, in which the Court of Exchequer Chamber in Ireland was of opinion that an assurance without interest was valid at common law, I should have said it was illegal, as giving one man an interest in the \*death of another. It is open to that objection, whether there was no interest at the time of the policy, [\*716] or whether there was interest then, and it has ceased. The 1st and 3d sections of the 14 Geo. III. c. 48, are to be read together, and the time pointed to by the 3d section is the time of recovery. The true construction of the statute, which is only applicable to an assurance by one person on the life of another, is, that an assurance on the life of a third person is to be treated as a contract of indemnity, even if it were not so at common law. If the interest becomes less, less is to be recovered; if it is gone altogether, nothing is to be recovered. In *Phillips v. Eastwood, Lloyd and Goold*, Ir. Rep., temp. Sugd. 270, 290, Lord Chancellor Sugden said: "As between the Assurance Office and the insured, the policy of assurance is only a contract of indemnity; but as between man and man, it is generally treated as an additional permanent security." In *Humphrey v. Arabin, Lloyd and Goold*, Ir. Rep., temp. Plunk. 318, 325, Lord Chancellor Plunket thought Lord Ellenborough's view was supported by the statute.

*Bramwell*, in reply.—The effect of the argument on the other side is, that the Stat. 14 Geo. III. c. 48, not only prohibits classes of contracts which were lawful before, but alters the effect of others which are still lawful. The title of the act is, "An act for Regulating Assurances upon Lives, and for prohibiting all such assurances, except in cases where the persons insuring shall have an interest in the life or death of the persons insured." The gaming would be committed at the time when the assurance was effected. Section 1, standing alone, prohibits assurances where there is no interest, but would allow them to be made for £1000, although the interest was only £100. The 3d section, however, prevents that, by qualifying the 1st section to that extent. The word "hath," in the 3d section, means "at the time of effecting the policy."

WIGHTMAN, J.—Although the interest should be reduced from £1000 to £100, yet the premiums would be paid as upon £1000, and so there is no reciprocity.

\*PARKE, B.—You say the whole thing is fixed at the time of [\*717] assurance. The question is one of great importance. If we think the interest ought to have continued, we will hear counsel again on the point, whether the bill of exceptions shows that the interest actually did continue.

*Cur. adv. vult.*

PARKE B., now delivered the following judgment.—This case comes before us on a bill of exceptions to the ruling of my Brother Cresswell at Nisi Prius. We learn that on the trial he reserved the important point which arose in it for the consideration of the Court of Common Pleas; that when it came on for discussion it was thought right to put it on the record in the shape of a bill of exceptions, that it might be carried, if it should be thought proper, to the highest tribunal; and we have now, after a very able argument on both sides, to dispose of it in

this Court of Error. It is an action on what is usually termed a policy of life assurance, brought by the plaintiff, as a trustee for the Anchor Life Assurance Company, upon a policy for £1000, on the life of his late royal highness the Duke of Cambridge. The Anchor Life Assurance Company had insured the duke's life in four separate policies,—two for £1000, and two for £500 each,—granted by that company to a Mr. Wright. In consequence of a resolution of their directors they determined to limit their assurances to £2000 on one life; and this assurance exceeding it, they effected a policy with the defendants for £1000 by way of counter-assurance. At the time this policy was subscribed by the defendants, the Anchor Company had unquestionably an insurable interest to the full amount. Afterwards an arrangement was made between the office and Mr. Wright, for the former to grant an annuity to Mr. Wright and his wife, in consideration of a sum of money, and of the delivering up the three policies to be cancelled, which was done; but one of the directors kept the present policy on foot by the payment of the premiums till the duke's death. It may be conceded, for the purpose of the present argument, that these transactions between Mr. Wright and the office totally put an end to that interest which the Anchor Company had when the policy was effected, and in re-  
 [\*718] spect of which it was effected, and that at the time of the duke's death, and up to the commencement of the suit, the petitioner had no interest whatever. This raises the very important question, Whether, under these circumstances, the assurance was void, and nothing could be recovered thereon? If the court had thought some interest at the time of the duke's death was necessary to make the policy valid, the facts attending the keeping up of the policy would have undergone further discussion. There is the usual averment in the declaration, that at the time of the making of the policy, and thence until the death of the duke, the Anchor Life Assurance Company was interested in the life of the duke; and a plea that they were not interested *modo et formâ*, which traverse makes it unnecessary to prove more than the interest at the time of making the policy, if that interest was sufficient to make it valid in point of law. (*Lush v. Russell*, 5 Exch. 203.) We are all of opinion that it was sufficient, and but for the case of *Godsall v. Boldero*, should have felt no doubt upon the question. The contract commonly called "life assurance," when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated in the first instance according to the probable duration of the life; and when once fixed it is constant and invariable. The stipulated amount of annuity is to be uniformly paid on one side, and the sum to be paid in the event of death is always (except where bonuses have been given by prosperous offices) the same on the other. This species of assurance in no way resembles a contract of indemnity. A policy of assurance against fire and against marine risks are both properly contracts of indemnity, the insurer engaging to make good certain limited amounts, the losses sustained by the insured in their buildings, ships, and effects. Policies on maritime risks were afterwards used im-

properly, and made mere wagers on the happening of those perils. This practice was limited by the 19 Geo. II. c. 37, and put an end to in all except a few cases; but at common law, before this statute, with respect to maritime risks, and the 14 Geo. III. c. 48, as to assurances on lives, it is perfectly clear \*that all contracts for wager policies and wagers which were not contrary to the policy of the law were [\*719] legal contracts; and so it is stated by the court in the report of *Cousins v. Nantes*, 3 Taunt. 513, to have been solemnly determined in the case of *Lucena v. Crawford*, without even a difference of opinion among the judges. To a like effect was the decision of the Court of Error in Ireland, before all the judges except three, in *Schweiger v. Magee*, 1 Cooke and Alc. Ir. Rep. 182, that the assurance was legal at common law. Their contract, therefore, in this case to pay the fixed sum of £1000 on the death of the late Duke of Cambridge would have been unquestionably legal at common law, whether the plaintiff had an interest therein or not; and the sole question is, Whether this policy was rendered illegal and void by the provisions of Stat. 14 Geo. III. c. 48? This depends upon its true construction. The statute recites that the making assurances on lives and other events, wherein the insured shall have no interest, hath introduced a mischievous kind of gaming, and for the remedy thereof it enacts, that no assurances shall be made by any one on the life or lives of any person or persons, or on any other events whatsoever, wherein the person or persons for whose use and benefit or on whose account such policy shall be made shall have no interest, or by way of gaming or wagering; and that every assurance made contrary to the true intent and meaning thereof shall be null and void, to all intents and purposes whatsoever. As the Anchor Assurance Company had unquestionably an interest in the continuance of the life of the Duke of Cambridge, and that to the amount of £1000, because they had bound themselves to pay a sum of £1000 to Mr. Wright on that event, the policy effected by them with the defendants was certainly legal and valid, and the plaintiff, without the slightest doubt, could have recovered the full amount if there were no other provision in the act. This contract is good at common law, and certainly not avoided by the 1st clause of the 14 Geo. III. c. 48. This section, it is to be observed, does not provide for any particular amount of interest. According to it, if there was any interest, however small, the policy would not be avoided. The question arises on the 3d clause; it is as follows:—"And be it further enacted, that in \*all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or re- [\*720] ceived from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events." Now, what is the meaning of this provision? On the part of the plaintiff it is said it means only that in all cases in which the party insuring has an interest when he effects the policy, his right to recover and receive is to be limited to that amount; otherwise, under colour of a small interest, a wagering policy might be made to a large amount, as it might if the 1st clause stood alone. The right to recover, therefore, is limited to the amount of the interest at the time of effecting the policy; upon that

value the insured must have the amount of premium calculated; if he states it truly, no difficulty can occur; he pays, in the annuity for life, the fair value of the sum payable on death. If he misrepresents by overrating the value of the interest, it is his own fault in paying more in the way of annuity than he ought, and he can recover only the true value of the interest in respect of which he effected the policy, but that value he can recover. Thus the liability of the insurer becomes constant and uniform, to pay an unvarying sum on the death of the *cestui que vie*, in consideration of an unvarying and uniform premium paid by the insured. The bargain is fixed as to amount on both sides. This construction is effected by reading the word "hath" as referring to the time of effecting the policy. By the 1st section the insured is prohibited from effecting an assurance on a life, or on an event wherein he "shall have" no interest, that is, at the time of insuring; and then the 3d section requires that he shall recover only the interest that he "hath;" if he has an interest when the policy is made, he is not wagering or gaming, and the prohibition of the statute does not apply to his case. Had the 3d section provided that no more than the amount or value of the interest should be insured, a question might have been raised, whether, if the assurance had been for a larger amount, the whole would not have been void; but the prohibition to recover or receive more than that amount obviates any difficulty on that head. On the other hand, the defendants contend that the meaning of this section is, that he shall re-  
 [\*721] cover no more than the value of the interest which he has at the time of the recovery, or receive no more than its value at the time of the receipt. The words must be altered materially to limit the sum to be recovered to the value at the time of the death, or if payable at a time after death, then when the cause of action accrues. But there is the most serious objection to any of these constructions. It is, that the written contract, which, for the reasons given before, is not a wagering contract, but a valid one, permitted by the statute, and very clear in its language, is by this mode of construction completely altered in its terms and effect. It is no longer a contract to pay a certain sum on the value of a then existing interest in the event of death, in consideration of a fixed annuity, calculated with reference to that sum, but a contract to pay, contrary to its express words, a varying sum, according to the alteration of the value of that interest at the time of death, or the accrual of the cause of action, or the time of the verdict or execution, and yet the price or the premium to be paid is fixed, calculated on the original fixed value, and is unvarying, so that the insured is obliged to pay a certain premium every year, calculated on the value of his interest at the time of the policy, in order to have a right to recover an uncertain sum, namely, that which happens to be the value of the interest at the time of the death or afterwards, or at the time of the verdict. He has not, therefore, a sum certain, which he stipulated for and bought with a certain annuity, but it may be a much less sum, or even none at all. This seems to us so contrary to practice and fair dealing and common honesty, that this construction cannot, we think, be put upon this section. We should, therefore, have no hesitation, if the question were

*res integra*, in putting the much more reasonable construction on the statute, that if there is an interest at the time of the policy it is not a wagering policy, and the true value of that interest may be recovered, in exact conformity with the words of the contract itself. The only effect of the statute is to make the insured value his interest at its true amount when he makes the contract. But it is said that the case of *Godsall v. Boldero* has concluded this question. Upon considering this case, it is certain that Lord Ellenborough decided it upon the assumption that a life policy \*was in its nature a contract of indemnity, as policies on marine risks and against fire undoubtedly are; and [\*722] that the action was, in point of law, founded on the supposed damnification occasioned by the death of the debtor existing at the time of the action brought, and his lordship relied upon the decision of Lord Mansfield in *Hamilton v. Mendes*, 2 Burr. 1210, that the plaintiff's demand was for an indemnity only. Lord Mansfield was speaking of a policy against marine risks, which is in its terms a contract for indemnity only. But that is not of the nature of what is termed an assurance for life; it really is what it is on the face of it,—a contract to pay a certain sum in the event of death; it is valid at common law, and, if it is made by a person having an interest in the duration of the life, is not prohibited by the Stat. 14 Geo. III. c. 48. But though we are quite satisfied that the case of *Godsall v. Boldero* was founded on a mistaken analogy, and wrong, we should hesitate to overrule it, though sitting in a court of error, if it had been constantly approved and followed, and not questioned, though many opportunities had been offered to question it. It was stated that it had not been disputed in practice, and had been cited by several eminent judges as established law. The judgment itself was not and could not be questioned in a court of error, for one of the issues, *nil debet*, was found for the defendant. Since that case we know practically—and that circumstance is mentioned by some of the judges in the cases hereafter referred to—that the assurance offices, generally speaking, have not availed themselves of the decision, as they found it very injurious to their interests to do so; they have, therefore, generally speaking, paid the amount of their life assurances, so that the number of cases in which it could be questioned is probably very small indeed; and it may be truly said, instead of the decision in *Godsall v. Boldero* being uniformly acquiesced in and acted upon, it has been uniformly disregarded. Then as to the cases, there is no case at law except that of *Barber v. Morris*, 1 Moo. and R. 62, in which the case of *Godsall v. Boldero* was accidentally noticed as proving it to be necessary that the interest should continue till the death of the *cestui que vie*. It was proved in that case to be the practice of the particular office in which that assurance \*was made, to pay the sums insured without inquiry as to the existence of an insurable interest; and on that [\*723] account it was held that the policy, though in that case the interest had ceased, was a valuable policy, and the plaintiff could not recover on the ground that the defendant, the vendor of it, was guilty of fraudulent concealment in not disclosing that the interest had ceased. This was the point of the case; and though there was a dictum of Lord Tenterden

that the payment of the sum insured could not be enforced, it was not at all necessary to the decision of the case. The other cases cited on the argument in this case were cases in equity, where the propriety of the decision of the case of *Godsall v. Boldero* did not come in question. The questions arose as to the right of the creditor and debtor *inter se*, where the offices had paid the value of a policy. *Humphrey v. Arabin, Lloyd and Goold*, Ir. Rep. temp. Plunk. 318; *Henson v. Blackwell*, 4 Hare, 434, cor. Wigram, V. C. In *Phillips v. Eastwood, Lloyd and Goold*, Ir. Rep., temp. Sugd. 281, the point decided was, that a life policy as a security for a debt passed under a will bequeathing debts, the lord chancellor stating that the offices found it not for their benefit to act on the rigid rule of *Godsall v. Boldero*. In these cases the different judges concerned in them do not dispute, some, indeed, appear to approve of, the case of *Godsall v. Boldero*; but it was not material in any to controvert it, and the questions to be decided were quite independent of the authority of that case. We do not think we ought to feel ourselves bound by the authority of this case, which itself could not be questioned by writ of error, and so few, if any, subsequent cases have arisen in which the soundness of the principle could be made the subject of judicial inquiry; and in practice, it may be said that it has been constantly disregarded. The judgment will therefore be reversed, and a *venire de novo* issue.

Judgment accordingly.

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[\*724] \*Whether the case of *Godsall v. Boldero* was otherwise rightly decided or not, it may be doubted whether the judgment did not go too far in restricting the claim of the plaintiff to the interest he had in Mr. Pitt's life at the date of the action being brought. Possessing as he did an interest in Mr. Pitt's life down to the date of his death, it would rather seem that he was entitled to recover the amount of his interest as at the date of the death, and that the circumstance of a third party having paid the debt after Mr. Pitt's death, ought not to have prevented his recovering the amount assured. The purpose of the statute seems to have been to prevent a party holding an assurance on the life of another when he had no interest depending on the life. If, however, the party retain his interest down to the death of the party whose life is assured, the object of the statute seems to be satisfied. In the recent case, however, effect was given neither to this middle view, nor to the view adopted by the Court of Queen's Bench, and it was held that the third section of the statute was to be taken in connexion with the first section; and that a party effecting an assurance upon the life of another was entitled to recover whatever amount of interest he had in the life at the date of effecting the assurance, although the day after effecting it his interest might have entirely ceased. It may be doubted whether such a result was intended by the legislature in passing the act. It may rather be thought that the true object of the statute was to prevent any party not merely effecting, but also holding a policy of assurance on the life of another when he had no interest in the life. To effect an assurance one day having an interest, and to hold it the following day without an interest, has rather the appearance of being an evasion of the statute. If, therefore, the construction recently put upon the statute be the right one, it will be for the legislature to consider whether the statute ought not to be amended so as to prevent any one holding a policy of assurance upon the life of another when he has no interest in the life. Public policy would seem to point to such a limitation in the law of life assurance.

\*THE INTEREST WHICH A PARTY EFFECTING AN ASSURANCE ON THE LIFE OF ANOTHER HAS IN THE LIFE ASSURED MUST BE A PECUNIARY INTEREST. [\*725]

# HALFORD v. KYMER.

May, 4, 1830.—E. 10 B. & C. 724. Eng. Com. Law Reps., vol. 21.

THIS was an action of covenant on a policy of insurance, dated the 13th of February, 1826, whereby the directors of the Asylum Life Insurance Company agreed with the plaintiff to insure the life of Robert Bargrave Halford, the son of the plaintiff, in the sum of £5000 for the term of two years, and covenanted, that if Robert Bargrave Halford should die at any time within the term of two years, to be computed from the day of the date of that policy, the funds of the company should be liable to pay, within six calendar months after proof of the death of the said Robert Bargrave Halford within the said term of two years, unto the said Richard Halford, his executors, &c., the sum of £5000.

Plea, first, that at the time of making the policy in the declaration mentioned, the plaintiff was not interested in the life of the said Robert Bargrave Halford. Secondly, that at the time of the death of the said Robert Bargrave Halford, the plaintiff was not interested in his life.

At the trial before Lord Tenterden, C. J., at the Middlesex sittings after last term, it appeared from the statement of the plaintiff's counsel, that "by a settlement, dated the 18th of May, 1805, made on the marriage of the plaintiff with S. T. Bargrave, the sum of £8000, and also the moneys to arise from the sale of certain freehold and leasehold estates, were settled, after and subject to the trusts for the plaintiff and his wife successively during their lives, in trust for the children or child of the said marriage, according to the appointment of the said plaintiff, and of his said wife, as therein mentioned; and in default of appointment, if there should be but one child of the said marriage, then in trust for such child, to become a vested interest in such child, if a son, at the age of twenty-one years; \*and if no child of the said marriage, or issue of such child, should become entitled to the vested interest in the said trust moneys, then upon such trusts as the said S. T. Bargrave should appoint; and in default of her appointment, in trust for her next of kin as if she had died intestate and unmarried." There was only one child of the marriage, namely, Robert Bargrave Halford; and the marriage of the plaintiff with the said S. T. Bargrave having been dissolved by act of parliament, the plaintiff married again, and effected the policy in question to provide against the death of his son, Robert Bargrave Halford, before he attained the age of twenty-one. The said Robert Bargrave Halford did attain the age of twenty-one years on the 2d of June, 1827, and on the 5th of January, 1828, made his will, and thereby gave all his real and personal estate to the plaintiff his father, and appointed him sole executor, and died on the 11th of January, 1828. The plaintiff, on the 17th of July, 1828, proved his son's will in the Prerogative Court of the Archbishop of Canterbury. Upon this

statement of facts, Lord Tenterden was of opinion that the plaintiff, not having any pecuniary interest in the life of his son at the time when he effected the policy, the same was void by the Statute 14 Geo. III. c. 48, § 3, and he nonsuited the plaintiff, but reserved liberty to him to move to enter a verdict if the court should be of opinion that he had an insurable interest.

*F. Pollock* now moved accordingly.—It is quite clear that, but for the Statute 14 Geo. III. c. 48, this policy would be available. That Statute, by sect. 1, enacts, “that no insurance shall be made by any person or persons on the life of any person or persons, or on any event or events whatsoever, wherein the person for whose use, benefit, or on whose account such policy shall be made, shall have no interest, or by way of gaming or wagering; and that every insurance made contrary to the true intent and meaning thereof shall be null and void to all intents and purposes whatsoever.” Now, the plaintiff clearly had an interest in the life of his son, for he might reasonably expect that the latter would reimburse him the expenses of his maintenance and education. This [\*727] clearly was not a \*wagering policy within the meaning of that clause. It is true that the third section enacts, “that in all cases where the assured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer than the amount or value of the interest insured on such life or lives, or other event or events.” It is clear that a man may effect an insurance on his own life, although he may have no pecuniary interest depending on it, and although his own income may be of the most ample kind, not depending on his own exertions or on any contingency; and if that be so, upon what principle can it be said that he cannot have an insurable interest in the life of his son or his wife? If a man be deprived of the comfort, society, and assistance of his wife by the misconduct of another, he may recover damages for that loss. So, if he be deprived of the services of his daughter by her seduction, or if he lose the assistance of any other member of his family by the wrongful act of another, he may maintain an action for damages. Surely the law, which gives a man a right of action for the wrongful act of another, by which he is deprived of the assistance of his wife, daughter, or servant, will not prevent him from protecting himself against that casualty which for ever deprives him of that assistance. [BAYLEY, J.—In *Innes v. The Equitable Assurance Company*, (which was tried before Lord Kenyon,) the plaintiff had effected a policy on the life of his daughter. In order to show that he had an interest, he produced a paper, purporting to be a will, by which it appeared that he was entitled to the sum of £1000 in the event of his daughter dying under the age of twenty-one. One Gardiner swore that he was a subscribing witness to the will, and that it was made at Glasgow, and that he was acquainted with the other subscribing witnesses; but another of those witnesses stated, that it was not made at Glasgow, but by a schoolmaster in the borough. Inness was tried, convicted, and executed for the forgery, and Gardiner, who had sworn that the will was made at Glasgow, was convicted of perjury.] [Lord TENTERDEN, C. J.—It was in effect admitted, in that case, that it was necessary to prove



that the father had a pecuniary interest in the life of his daughter, otherwise there would have been no occasion to go into the question as to the will; \*and unless it were a fact material in the case, the witness could not have been convicted of perjury.] That was [\*728] only a *Nisi Prius* case. But a father has a legal interest in the life of his son sufficient to entitle him to insure. By the statute of Elizabeth, if a father become poor in his old age, and his son be capable of maintaining him, he is bound to do so. Now, why does a man insure the life of his debtor? Because the death of his debtor diminishes the chance of his being paid. So, if a son dies, the chance of the father being maintained in poverty and old age is diminished. [BAYLEY, J.—The parish is bound to maintain him, and it is indifferent to him whether he be maintained by the parish or his son.] The amount of maintenance which a parish must afford may, in many cases, be much less than that which a son would be ordered to pay. Besides, a father may have a claim on his son, when he has no claim on the parish. He may not be able to show his settlement in the parish from which he claims relief. In that case the life of his son would be of importance to him, as affording him the certainty of having a comfortable provision. The word “interest” in the act of parliament is not to be confined in construction to pecuniary interest, but may be taken to mean legal interest; and the third section, which allows the insured to recover to the amount or value of his interest, shows that the law would recognise an interest of any kind, provided a value can be set upon it.

LORD TENTERDEN, C. J.—I retain the opinion which I expressed at the trial, that the word interest in this statute means pecuniary interest.

BAYLEY, J.—It is enacted by the third section, “that no greater sum shall be recovered than the amount of the value of the interest of the insured in the life or lives.” Now, what was the amount or value of the interest of the party insuring in this case?—Not one farthing certainly. It has been said that there are numerous instances in which a father has effected an insurance on the life of his son. If a father, wishing to give his son some property to dispose of, make an insurance on his son’s life in his (the son’s) name, not for his (the father’s) own benefit, \*but [\*729] for the benefit of his son, there is no law to prevent his doing so; but that is a transaction quite different from the present; and if a notion prevails that such an insurance as the one in question is valid, the sooner it is corrected the better.

LITLEDALE and PARKE, Js., concurred.

Rule refused.

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A PARTY EFFECTING A LIFE ASSURANCE IS BOUND TO COMMUNICATE TO THE ASSURER ALL MATERIAL FACTS WITHIN HIS KNOWLEDGE TOUCHING THE SUBJECT-MATTER OF THE ASSURANCE, AND IT IS A JURY

QUESTION WHETHER ANY PARTICULAR FACT NOT COMMUNICATED IS OR IS NOT MATERIAL.

# I.—MORRISON v. MUSPRATT.

Jan. 31, 1827.—E. 4 Bing. 60. Eng. Com. Law Reps., vol. 13.

THIS was an action on a policy of insurance executed by the defendants on the life of a Mrs. Elgie.

At the trial before Abbott, C. J., Lincoln Summer Assizes, 1826, it appeared that for some years previous to December, 1822, Mrs. Elgie had been in a delicate state of health, exhibiting, particularly in the year 1821, symptoms which were thought to be phthical; and having been in October, 1822, twice alarmingly ill, in December, 1822, Mr. Boot, a medical practitioner, who resided some miles off, and was not then in attendance upon her, but who had known her for many years, was sent for to examine her, with a view to the present insurance: he examined particularly the state of her lungs and liver, and finding them, as he thought, sound, certified to the defendants that the ordinary state of her health was good. On the 19th of March following he gave another certificate to the same effect, upon which the insurance was effected in April, 1823. Mrs. Elgie died of diseased lungs in April, 1824.

Between December, 1822, and the 19th of March, 1823, she was attended by Mr. Bland, a medical practitioner who resided in her neighbourhood.

[\*730] \*She had a troublesome cough, and became much emaciated; her diet was regulated with a view to add to her strength without increasing febrile symptoms and irritation, to which she was then subject in the evening; but Mr. Bland thought that disease of structure had not taken place.

When the insurance was effected, no communication was made of this illness or of the attendance of Mr. Bland.

The learned chief-justice left it to the jury generally to say, whether any misrepresentation had been made to the defendants, but did not expressly call on them to consider whether the illness in January and February, 1823, and the attendance of Mr. Bland, ought to have been communicated before the insurance was effected.

A verdict having been found for the plaintiff,

*Wilde*, Serjt., in the last term obtained a rule *nisi* for a new trial, on the ground that there had not been so full a disclosure to the defendants of Mrs. Elgie's situation as they were entitled to receive. \

*Vaughan* and *Taddy*, Serjts., who showed cause, contended that all which it was material for the defendants to know was, the condition of the life at the time of the insurance, and that there was no evidence to show that Mrs. Elgie was not in good health on the 19th of March and the 23d of April. Provided her health was re-established at the time of the insurance, the knowledge of her previous condition could be of no importance to the defendants.

*Bosanquet*, Serjt., in support of the rule, argued that if the defendants had been made acquainted with the previous illness they might have

been deterred from the insurance by the apprehension of a relapse; and he cited *Carter v. Boehn*, 3 Burr. 1905; *Bufe v. Turner*, 2 Marsh. 47; and *Fitzherbert v. Mather*, 1 T. R. 12, to show that an insurance is a contract *uberrimæ fidei*, and that it is avoided by the suppression of any circumstance which may assist the insurer towards forming a correct judgment.

\*BEST, C. J.—Whether or not it was material for the defendants to have been made acquainted with the fact which has been [\*731] withheld from their knowledge, is a question for the jury. It is probable, however, it would be esteemed material, because all insurance offices are desirous to consult with the medical man who has been last in attendance on the life insured.

I think, therefore, there should be a new trial on payment of costs, as the attendance of Bland on Mrs. Elgie was not disclosed to the insurers.

BURROUGH, J.—Advantage ought not to be taken of the omission of trifling circumstances. But the attendance of Bland on Mrs. Elgie ought to have been brought to the attention of the jury, to decide whether or not it ought to have been disclosed to the defendants.

GASELEE, J.—We do not lay it down as a rule, that the omission to bring to the consideration of the jury any single circumstance shall in all cases of this nature afford a ground for a new trial; but if the defendants in the present case had known of the attendance of a medical man from January to March before they signed the policy, it is probable they would have paused or have altered their terms. The jury, therefore, ought to have considered the materiality of that circumstance, and the defendants are entitled to make the present

Rule absolute.

## II.—LINDENAU v. DESBOROUGH.

Nov. 12. 1828.—E. 8 B. & C. 586. Eng. Com. Law Reps., vol. 15.

ASSUMPSIT against the secretary of the Atlas Insurance Company on a policy of insurance on the life of the Duke of Saxe Gotha. Plea, the general issue.

At the trial before Lord Tenterden, C. J., it appeared that [\*732] \*in 1824 an insurance was effected on the life of the duke with the Union Assurance Company. That company had an agent in Germany, who, on behalf of his principals, submitted certain questions to the physicians of the duke, many of them as to specific diseases, and his habits of life; and the last was, “Is there any other circumstance within your knowledge which the directors ought to be acquainted with?” and this was answered in the negative. There was also a private certificate sent by the agent to the directors in answer to their inquiries as to certain points. In this also there was a general question. “Do you know any other circumstance which ought to be communicated to the directors?” which was answered as follows: “Agreeably to our informations, the duke has led a dissolute life in former days, by which he has lost the

use of his speech, and, according to some informations, also that of his mental faculties, which, however, is contradicted by the medical men; and as little as we believe that this has any influence on his natural life, we find it our duty to mention it." The physicians in one of their answers said the duke was hindered in his speech, but did not mention the state of his mental faculties. An application was made to the Union to insure a further sum on the duke's life; but that being contrary to their general rules, their agent handed over the proposal to the Atlas, and at the same time gave the latter company the private answers received from their agent in Germany. The plaintiff signed the usual declaration, and declarations by the duke's physicians were made to the Atlas similar to those made to the Union. Upon receiving these documents the Atlas entered into the policy. In 1825 the duke died, and it was then discovered that there had existed in his head for many years a large tumour pressing on the brain, to which the loss of speech and mental faculties might be attributed; but all the medical testimony went to establish that the symptoms during the duke's life were not such as were likely to excite the suspicion that such a tumour existed, or that he was afflicted with any particular disorder tending to shorten life. One foreign physician, however, said, that had he been consulted he should have thought it right to state that he attributed the loss of speech to a [733] paralysis of the organs of speech. And an English \*surgeon called for the plaintiff, on cross-examination said he should in answer to the general question, "Whether he knew any other circumstances that ought to be communicated to the directors?" have thought it right to mention the state of the duke's mental faculties. Upon hearing this evidence, Lord Tenterden told the plaintiff's counsel he thought it made an end of his case; and he should leave it to the jury to say whether there were any facts material to be known which were not mentioned to the assurers, and that if there were, the policy was void. The plaintiff's counsel thereupon elected to be nonsuited, leave being given to him to move for a new trial, on the ground of misdirection.

*Brougham* now moved accordingly.—The proposed direction to the jury cannot be supported, inasmuch as it referred the materiality of the fact not mentioned to the judgment of the jury, and not to the opinion of the party making the declaration. To specific questions the party must truly answer whether they are material or not; but to a general question the answer is sufficient, unless the party conceal that which he believes to be material. If the contrary were the law, no policy could be effected with safety, for the most skilful men differ upon such questions; and a party having *bona fide* given all the information that a skilful adviser thinks material may afterwards find his insurance of no avail, because another person at some future time thinks a fact not mentioned was material. [BAYLEY, J.—Can you support the position that the materiality is to depend on the opinion of the party insuring, and not on the real state of the fact?] In *Mayne v. Walter, Park, Ins. 531*, Lord Mansfield said, "It must be a fraudulent concealment to vitiate a policy." [BAYLEY, J.—In *Huguenin v. Rayley, 6 Taunt. 186*, it was held to be a question for the jury whether a fact not

communicated was material.] That certainly is one question for the jury ; and because it had not been left to them, the nonsuit which had there been directed was set aside : but it is also a question for the jury whether the party believed the fact to be material. But, secondly, supposing the materiality to have been properly referred to the jury in this case, it should have also been left to them to say \*whether the insurers had not information *aliunde* of the fact omitted by the [\*734] physicians. In *Carter v. Boehm*, 3 Burr. 1910, Lord Mansfield says, "An underwriter cannot insist that the policy is void because the insured did not tell him what he actually knew, what way soever he came to the knowledge." Now it appeared in evidence that the private communication made to the Union Assurance Company had been delivered over to the Atlas, and in that the duke's loss of speech and the imbecility of his mental faculties were mentioned. Thirdly, the fact of the duke's want of mental faculty did not affect his apparent bodily health ; no one of the medical witnesses affected to say that he should have considered the risk increased on that account, and taking the case most strongly against the assured, he warrants a state of apparent bodily health. Now the assured need not mention anything covered by the warranty, *Haywood v. Rodgers*, 4 East, 590 ; and had such a warranty been expressed in this case, the question for the jury would have been, whether the party was in a reasonably good state of health, and such a life as ought to be insured on common terms, *Ross v. Bradshaw*, 1 W. Bl. 312, and the jury must have answered such a question in the affirmative. [BAYLEY, J.—In *Bufe v. Turner*, 6 Taunt. 338, it appeared that the plaintiff was possessed of several warehouses ; one of which was adjoining to a boat-builder's shop. A fire broke out in this shop, but was subdued and apparently extinguished. The plaintiff immediately afterwards sent an order to effect an insurance on his premises. On the following morning the fire again broke out at the boat-builder's and consumed the plaintiff's warehouses. The jury acquitted the plaintiff of any fraud or dishonest design, but thought he should have communicated to the underwriters the circumstance of the fire that had happened before he ordered the insurance ; and because he did not do so returned a verdict for the defendant, and the court afterwards refused to grant a new trial.] The report does not state on what ground the new trial was refused.

Lord TENTERDEN, C. J.—At the trial before me amongst other depositions that of a foreign physician named Stark was read, wherein he stated that he would have certified that the \*duke was in bodily health, but that he would not have failed to observe that he [\*735] laboured under an inability to speak, which he attributed to a paralytic state of the nerves of the organs of speech. In addition to this, Mr. Green, a surgeon, stated, that if consulted he should have thought it right to mention the state of the duke's mental faculties, whereupon I expressed an opinion that the cause was at an end, and said that I should direct the jury to find for the defendant if they thought the plaintiff had failed to communicate to the insurers any material circumstance within his knowledge. The only question now is, Whether that direction would have been correct or not ? At the time of the trial, I had in my recollection,

although not very accurately, the case of *Morrison v. Muspratt*, 4 Bing. 60, which was tried before me at Lincoln. By the printed report, it appears that in April, 1823, an insurance was effected upon the life of a lady, who at the end of 1822 had suffered from a pulmonary attack, and was attended by a surgeon. In March, 1823, a medical practitioner who had known her for some years, but did not attend her during that illness, was sent for to examine her with a view to effecting the insurance in question; and he certified that she was in good health. In 1824 she died of a pulmonary disease. I left it to the jury generally to say whether any misrepresentation had been made; and the jury having found a verdict for the plaintiff, the Court of Common Pleas granted a new trial, on the ground that the jury ought to have been called upon to say whether it was material for the defendants to have been made acquainted with the illness of the lady in 1822. In the present case, the insurance was upon the life of a foreigner. It appeared that a previous insurance had been effected with an office that had an agent abroad. That office was requested to make a further insurance, and being unwilling to do so, the secretary handed over to the defendant the certificate received from their foreign agent. If that had distinctly disclosed the fact now in question, I am not prepared to say that the defendant would have had any ground of complaint; but the state of the duke's faculties is not distinctly stated in that certificate. Then it is said that the party is not bound to do more than answer the questions proposed, unless he can be [\*736] charged with some fraudulent concealment. \*Admitting this not to fall within any of the specific questions, which is not by any means clear, still the general question put by the office requires information of every fact which any reasonable man would think material. It certainly seems to me that the circumstances proved as to the state of the Duke of Saxe Gotha's mental faculties were material; and upon the authority of the cases of *Morrison v. Muspratt* and *Bufe v. Turner*, I think I should not have done wrong in leaving the case to the jury in the manner proposed at the trial.

BAYLEY, J.—I think that in all cases of insurance, whether on ships, houses, or lives, the underwriter should be informed of every material circumstance within the knowledge of the assured; and that the proper question is, Whether any particular circumstance was in fact material? and not whether the party believed it to be so. The contrary doctrine would lead to frequent suppression of information, and it would often be extremely difficult to show that the party neglecting to give the information thought it material. But if it be held that all material facts must be disclosed, it will be the interest of the assured to make a full and fair disclosure of all the information within their reach. Besides the cases already mentioned, there are others establishing that the concealment of a material fact, although not fraudulent, is sufficient to vitiate a policy on a ship. On these grounds and authorities, I am of opinion that the proper question for the jury was not whether the party believed the information withheld to be material, but whether it was in fact material.

LITLEDALE, J.—I am of the same opinion. It is the duty of the assured in all cases to disclose all material facts within their knowledge.

In cases of life insurance, certain specific questions are proposed as to points affecting in general all mankind. But there may be also circumstances affecting particular individuals which are not likely to be known to the assurers, and which had they been known would no doubt have been made the subject of specific inquiries. The general question appears to have been proposed in order to meet such cases, and I think the question on such a policy is not whether a \*certain individual thought a particular fact material, but whether it was in truth material, [\*737] and of that the jury are by law constituted the judges. I therefore think the proposed direction would have been right, and that the nonsuit ought not to be disturbed.

Rule refused.

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THE PARTY FOR WHOSE BENEFIT AN ASSURANCE IS EFFECTED IS BOUND BY THE REPRESENTATIONS OF THE PARTY WHOSE LIFE IS ASSURED, OR OF THOSE OF THE PARTY TO WHOM REFERENCE IS MADE FOR INFORMATION, THE PARTY GIVING INFORMATION BEING HELD TO BE THE IMPLIED AGENT OF THE PARTY ASSURING, OR FOR WHOSE BENEFIT THE ASSURANCE IS EFFECTED.

# I.—MAYNARD v. RHODES.

Nov. 8, 1824.—E. 5 D. & R. 266. Eng. Com. Law Reps., vol. 16.

ASSUMPSIT on a policy of insurance effected on the life of a Mr. Lyon, for the benefit of the plaintiff. Plea, non-assumpsit. At the trial before Abbott, C. J., at the Middlesex Sittings after last Trinity Term, it appeared that the plaintiff having advanced a sum of money to Mr. Lyon, effected a policy of insurance upon the life of the latter by way of collateral security. Mr. Lyon, in conformity with the regulations of the insurance office, attended to give the usual information as to the state of his health, and in the result the policy was effected. Within a few months afterwards, Mr. Lyon died of a disorder of long standing, but which he had concealed from the office at the time the policy was effected, and the office having refused to pay the amount insured, the present action was brought. It was contended on the part of the plaintiff that inasmuch as the plaintiff had himself made no representation as to the state of Mr. Lyon's health, and as the office had acted upon the representation made by the latter, the action was maintainable. The learned judge told the jury that if they were satisfied that \*the representation made by Mr. Lyon was not substantially true at the time the policy was [\*738] effected, it must be considered as a condition incorporated in the policy, by which the plaintiff would be bound, although he himself was not privy to the falsehood of the representation. The jury under this direction found a verdict for the defendant.

*Scarlett* now moved for a rule *nisi* for a new trial on the ground of

misdirection. Admitting the general principle, that if a representation respecting the subject-matter of insurance turns out to be substantially false, it shall make void the policy, still if the insurance is made for the benefit of a third person, who is wholly ignorant of the state of health of the party whose life is insured, and is in no way privy to the falsehood of the representation, he shall not be prejudiced by a breach of the condition on which the policy is effected. Here the insurance office was informed at the time the policy was effected, that the plaintiff was about to advance money to Mr. Lyon, and that the insurance was to be for the plaintiff's benefit. The office made such inquiries as they thought necessary to ascertain the state of Mr. Lyon's health, and having satisfied themselves that his was an insurable life, they effected the policy. In point of law, therefore, the plaintiff ought not to be prejudiced by the breach of a condition to which he was not privy.

BAYLEY, J.—I am of opinion that the direction of the lord chief-justice to the jury was correct in point of law. The representation made by Mr. Lyon as to the state of his health must be incorporated in the policy as a condition, making the instrument void or binding according as the condition should or should not be broken. It can make no difference as to the result, in point of law, whether the insurance is for the benefit of the party whose life is insured, or for the benefit of a third person. The truth of the representation is equally a condition in both cases.

HOLROYD, J.—If the jury were satisfied that the representation, though made by Mr. Lyon himself, was untrue, it can make no difference [739] in the legal result whether the policy was \*effected for his benefit or not. It was a conditional policy, and the party for whose benefit it was effected must stand to the consequences.

LITLEDALE, J.—I have not the slightest difficulty upon the point, and I agree with the rest of the court in thinking that there is no ground for a new trial.

Rule refused.

## II.—EVERETT v. DESBOROUGH.

May 27, 1829.—E. 5 Bing. 503. Eng. Com. Law Reps., vol. 15.

ASSUMPSIT on a policy of insurance, effected for the plaintiff on the life of James House with the Atlas Insurance Company, of which the defendant was the secretary.

By the policy, certain conditions on the back of it were declared to be a part of the policy as much as if they had been repeated in the body of it.

These conditions were as follow, in two columns :—

### “ COLUMN THE FIRST.

#### “ *Conditions of Life Assurance.*

“ Persons proposing to effect Life Assurance, will be required to state the following particulars ; viz.



- " 1. Name and residence of the party by whom the proposal is made.
- " 2. Name, residence, and profession of the person whose life is to be assured ; and, in case of an assurance upon survivorship, the name, residence, and profession of each party.
- " 3. Place and date of birth ; and age next birth-day.
- " 4. Sum to be assured, and the term.
- " 5. Whether afflicted with gout, asthma, fits, spitting of blood, or any other disorder which tends to shorten life.
- " 6. Whether the party has had either the small-pox or cow-pox.
- \*" 7. Whether the party will attend personally, either at the office in London, or before one of the company's agents. [\*740]
- " 8. Whether employed in the military or naval service.
- " 9. Names and residences of two gentlemen to be referred to, respecting the present and general state of health of the life to be assured. *One to be the usual medical attendant of the party.*
- " A declaration as to all the above points will be considered as the basis of the contract between the assured and the company. If such a declaration be not in all respects true, the policy will become void, and the premium that may have been paid will be forfeited.

" COLUMN THE SECOND.

- " 10. No assurance to be in force until the premium has been paid ; nor will any policy be considered valid for more than fifteen days after the expiration of the period limited therein, unless the premium conditioned for the renewal of such policy, shall have been paid within that period, and the printed form of office-receipt given. But such assurances may be revived at any period not exceeding three months after their expiration, on satisfactory proof being given to the directors of the unimpaired state of the health of the life assured, and on payment of the premium, with an addition of 5s. for every £100 assured.
- " 11. Policies will become void if the parties whose lives have been assured, shall go beyond the limits of Europe, or shall die on the high seas, (except in passing, during peace, in king's ships or packet or passage vessels from any one part of the United Kingdom of Great Britain and Ireland to any other part thereof ; or in passing direct, by a similar conveyance, from and to any port in Great Britain, to and from any port between Rotterdam and Brest, both inclusive, or to and from Guernsey, Jersey, Alderney, or Sark,) unless special permission shall have been granted by the directors, which may be obtained on the parties attending personally at the office, to give every requisite explanation, and paying such extra premium as the directors may deem adequate to the risk incurred.
- \*" 12. Policies will also be void if the parties whose lives have been assured, shall be actually employed in any military or naval service whatever. [\*741]
- " 13. Assurances, made by persons on their own lives, will be void if they die by the hands of justice, by duelling, or by suicide. But should the families of such persons be left in distress and poverty, the direc-

tors, in their discretion, will make such allowance in respect of the policies of the deceased as they may deem just and reasonable.

"14. Assignments of life policies may be made without giving notice to the company.

"15. Persons effecting assurances on other lives than their own, will be required to state the nature of the interest they possess in such lives.

"16. All claims upon the company will be paid within three months after satisfactory proof shall have been produced of the death of the persons upon whose lives assurances have been effected.

"17. In cases of assurances in Ireland, the company undertake to appear in the courts of law there to any action commenced against them.

"By order of the directors,

"HENRY DESBOROUGH, Jun.,

"*London, 27th December, 1825.*"

"*Secretary.*"

The declaration in the cause stated, that the plaintiff caused to be made a certain policy of assurance, whereby the Atlas Company, "relying on the truth of a certain declaration made by the plaintiff in compliance with the conditions on the policy indorsed, (wherein it was declared that the age of House did not exceed forty-four years; that he had had the small-pox; had not had the gout; had not suffered a spitting of blood; and was not and had never been afflicted with asthma or fits, or with any disorder which tended to shorten life,) agreed, in consideration of a premium of £37, 17s. 6d., to pay him £1000, in case James House should die within a year; provided that the policy should be subject to the printed conditions indorsed thereon, in the same [\*742] manner as if the same were there actually \*repeated, and adapted to that present case." And by those conditions it was expressed and declared, that persons proposing to effect life insurance would be required to state the following particulars, &c. :—(*inter alia*) the names and residences of two gentlemen to be referred to, respecting the present and general state of health of the life to be assured; one, to be the usual medical attendant of the party :—a declaration as to all the above points would be considered as the basis of the contract between the assured and the company. And the plaintiff averred, that he did make a declaration according to the requisitions of the said printed conditions, and that the declaration so by him made, and referred to in the policy, was in all respects true. He then averred the death of House, and the defendant's refusal to pay.

The defendant pleaded the general issue; and paid the amount of the premium into court, upon a count for money had and received.

At the trial, before Gaselee, J., the following were the circumstances proved on the part of the plaintiff :—

The plaintiff being known to possess some leasehold property determinable on the life of House, was applied to by Lye, agent of the Atlas Company at Warminster, (near which place the plaintiff and House resided,) to effect an insurance with the Atlas Company.

The plaintiff agreed to insure £1000; but as he had never seen

House, and knew nothing of him, he told Lye to make the requisite inquiries, and do all that was proper in the business.

House, who at this time, and for six months preceding, had been residing with his mother, managing a farm of hers near Warminster, was a remarkably handsome athletic man, bearing all the external indications of rude health; and was believed by Lye, who had known him since his birth, and by all the inhabitants of Warminster, to be the healthiest and stoutest man of that healthy district. He bore a good character, and was, while residing there, of remarkably temperate and regular habits.

Lye called on him at his mother's, and at a house in Bath, (sixteen miles off,) where, previously to the last six months, he [\*743] had resided for some years.

In answer to the inquiry, "Who was his usual medical attendant?" House said, "I have never had occasion for a doctor; sometimes I have taken Harvey's quack pills; but Mr. Vicary of Warminster knows as much of me as any man."

Mr. Vicary, a respectable and intelligent medical man, had never attended House professionally, but had known him from his birth, and had attended the rest of his family.

In a written communication made by him to the Atlas Office, and in his testimony at the trial, he stated that he had never seen a stronger or healthier man.

Lye transmitted to the office a statement made by himself, in which, among other things, it was declared that House referred to Mr. Vicary as his usual medical attendant. This statement occupied half the sheet of a letter, and was signed by Lye; Lye showed this to the plaintiff, and was beginning to read it over, when the plaintiff said, "I dare say it is all correct;" and on the other half sheet the plaintiff signed a separate declaration that House had had the small-pox; had not had the gout, &c.; was not afflicted with any disorder tending to shorten life; and that his age, residence, and occupation were as therein described.

On the part of the office it was proved, that House, when he resided at Bath, had been wont occasionally to indulge in extraordinary fits or bouts of intoxication. At these times he would be drunk day and night incessantly for ten days, a fortnight, or even three weeks, swallowing anything and everything that came in his way. He was always attended after these bouts by his neighbour Harvey, a quack doctor, who bled and purged him copiously. He went over to Bath, from his mother's, shortly before the insurance was effected, had one of these bouts, recovered, and died suddenly at his mother's a few days afterwards.

These facts, however, and Harvey's attendance were unknown to the plaintiff, to Lye and to the inhabitants of Warminster generally; and Mr. Vicary, the surgeon who examined House when the insurance was effected, asserted at the trial, that whatever his habits might have been, they had at the time \*of the insurance produced no perceptible [\*744] effect upon his appearance or constitution.

On the part of the office it was contended, that these bouts of intoxication were a material circumstance, the non-disclosure of which avoided

the policy; and that, at all events, it was a condition precedent to any liability on the part of the office that they should have been informed of the name of House's usual medical attendant; and that this condition had been neglected, Harvey having been his usual medical attendant, and not Vicary.

To this it was answered, first, that the plaintiff's warranty was only against any disorder tending to shorten life, that he had not warranted against pernicious habits; that he could not be expected to disclose what he never knew; and that at all events it was sufficient if House was an insurable life at the time the insurance was effected.

Secondly, that House was not the agent of the plaintiff, who, therefore, ought not to be affected by misrepresentations, if any, made by him; and that though in ordinary cases the assured might be bound to furnish all the information required by the office, yet here, the defendant's agent having solicited the insurance, and the plaintiff having left it to him to make all the necessary inquiries, the office had taken the task of inquiry upon themselves, and had absolved the plaintiff from the duties usually imposed upon the assured.

*Gaselee, J.*, left it to the jury to say, first, Whether at the time of effecting the insurance House was an insurable life; secondly, Whether there had been a concealment of any circumstance which it was material for the office to know; and thirdly, Whether Lye had acted as the agent of the plaintiff, or of the office, or of both.

The jury found that House was an insurable life; that there was no concealment of any material circumstance; and that Lye was solely the agent of the office,—and gave their verdict for the plaintiff.

*Merewether, Serjt.*, obtained a rule *nisi* to set aside this \*verdict, and enter a nonsuit instead, upon the grounds urged at the trial.

He relied on *Lindenau v. Desborough*, 8 B. and C. 586, where, in an insurance effected on the life of the Duke of Saxe Gotha, it was holden that the plaintiff could not recover, because he had omitted to disclose to the insurers the circumstance that the duke was imbecile, so as to be scarcely able to speak, although it was not supposed that his life could be affected by that circumstance; on *Maynard v. Rhodes*, 5 D. and R. 266, where the party effecting an insurance on the life of another was holden responsible for the representations made by the life insured; and on *Morrison v. Muspratt*, 4 Bing. 60, where the court granted a new trial, because the office had not been referred to the person who had been medical attendant of the life insured during the last illness she had previously to the insurance.

*Wilde, Serjt.*, showed cause.—The conditions indorsed on the policy are of two kinds; those in the first column are preliminaries to the contract, to be attended to by persons proposing to insure, previously to their entering into the contract; those in the second column are parcel of the contract when completed.

It is competent to the insurers to dispense with any of the preliminary inquiries, or to take the burthen of them upon themselves, or to insist that the information required shall be furnished by the assured. But

if, for whatever reason, they dispense with the assured's furnishing them with that information which is usually required at his hands: if they take the responsibility of inquiry upon themselves, and then sign a policy in which they declare that all the preliminaries required by them have been observed, they cannot afterwards avoid the policy on the ground that the assured has withheld information which they never required at his hands.

In this case there was such a dispensation on the part of the insurance office. They by their agent take the first step, and solicit the plaintiff to insure with them. The plaintiff knows nothing of the life insured, and can give no information on the matters preliminary to the contract; but in consideration that \*he will give their office the preference, [\*746] they engage, through their agent Lye, to make all the necessary inquiries themselves.

They do not exact from the plaintiff a declaration or warranty that House has correctly referred to his usual medical attendant; but merely that he is not affected with any disorder tending to shorten life; and drunkenness is a habit, not a disease or disorder.

The declaration as to the usual medical attendant is signed only by Lye, who is found by the jury to have been solely the agent of the office.

If, therefore, in ordinary cases the assured is bound to state accurately who is the usual medical attendant of the life insured, the office have dispensed with such a statement from him here, and have admitted such dispensation by the policy they have executed, in which they recite that the plaintiff has signed a declaration in compliance with the conditions of the policy. If they had required the plaintiff to answer for the reference to the medical man, a declaration as to House's health only,—and the plaintiff signed no other,—would not have been a compliance with their requisition.

It must be taken, therefore, that they accepted the declaration of their own agent, Lye, with respect to House's usual medical attendant, as the declaration made, as to that point, in compliance with the conditions of the policy. If so, they are bound by the acts of their own agent; they are responsible for his accuracy, and cannot cast upon the plaintiff the consequences of his inaccuracy.

Lye having undertaken on the part of the office to procure the proper reference, it is no longer any part of the plaintiff's warranty. Lye's seeking the information at the hands of House was merely accidental; he was at liberty to inquire where he pleased; but the plaintiff could not be responsible for the falsehoods or inaccuracies of strangers whom Lye might consult; and to the plaintiff House was an entire stranger. To bind the plaintiff, a representation must have been made either by himself or his agent. But the plaintiff himself was absolved by the office from making any representation on the subject of the usual medical attendant; it is impossible to say that House, whom he had never seen, was his agent; and Lye was the agent of the office.

\*And this distinguishes the present case from those which [\*747] have been relied on on the part of the defendants.

In *Lindenau v. Desborough* the decision turned on the plaintiff's  
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omitting to disclose a material fact which must have been within his knowledge or that of his agents; the state of the mental faculties of the life insured; there was no undertaking on the part of the office to obtain at their own risk the information he ought to have supplied; no waiver of any condition usually imposed on the assured. The same remark is applicable to *Morrison v. Muspratt*, where a husband who had effected an insurance on the life of his wife fraudulently omitted to disclose the circumstance of her having been long afflicted with pulmonary disease, and the name of the medical man who had attended her.

In *Maynard v. Rhodes* the declaration in the cause alleged that Colonel Lyon, the life insured, had himself subscribed and delivered into the Pelican Office, a declaration setting forth his ordinary and then state of health; and that such declaration did set it forth truly, and was part of the consideration for the defendant's entering into the contract. It appeared that Colonel Lyon was known to the plaintiff; that he was sent to the office to be examined personally on the 23d of May, 1823; and that upon that occasion he signed a declaration that a gentleman of Chichester was his medical attendant; that he had never been seriously ill, and was then in good health; whereas from the month of February, preceding that declaration to the month of June, after, he had been attended in London by Dr. Veitch and Mr. Jordan on account of a determination of blood to the head, for which he was bled and blistered, and underwent other medical regimen.

There, the plaintiff took upon himself to aver that the declarations of the life assured touching his health were true; an averment which he could not establish in point of fact.

The plaintiff in the present case has set out the declaration he made himself. That declaration is confined to the age, profession, and exemption from mortal disorder of the life assured; and that declaration he has proved, as well as averred, to be true.

[\*748] The preliminary reference to his medical attendant by the \*life assured forms no part of the declaration signed by the plaintiff, and formed no part of his contract with the office, inasmuch as they had absolved him from giving them any information on the subject, and had through their agent Lye taken the risk of inquiry on themselves.

*Merewether.*—The basis of the contract between the plaintiff and the office is, among other things, that the office shall be informed who is the usual medical attendant of the life insured; and whether that information was to be obtained by Lye for the office, or to be communicated by the plaintiff, or by the life insured as constructively agent for both parties, the plaintiff by signing the contract enters into a warranty that the reference to the medical attendant is a correct reference.

Admitting, however, that Lye was the agent of the office for all inquiries from which it was possible to exonerate the plaintiff, and which the office could make independently of him or his agents, yet for the purpose of stating what is his health, or who is his medical attendant, the life insured is impliedly and necessarily the agent of the party who effects the insurance. His agency for the party insuring, in all matters which can only be learnt from him, is perfectly compatible with Lye's

being agent for the office in all other matters usually cast upon the party insuring. The life insured is the only person who can give the required reference correctly. He is not the agent of the office, because they are not the persons called on, but calling, to act; not the persons required, but requiring the reference to be given; he must, therefore, be the agent of the party at whose hands that reference is required; the party who, as the basis of his contract, is called on to warrant that the reference, however obtained, by whomsoever furnished, is at all events true.

The plaintiff, if he could not place sufficient reliance on the declarations of the life insured, might easily decline to enter into any such warranty, or to sign any such contract; but if he signs it the office ought not to suffer from the temerity of his warranty; for it is plain that they would never have entered into the contract, at least upon the same terms, if they had spoken with the usual medical attendant.

\*BEST, C. J.—No longer ago than when the case of *Morrison v. Muspratt* was decided, this court held, that if there was a reference to a man who had been the medical attendant, and no reference to the person who was the medical attendant of the life insured at the time the policy was effected, such an omission to refer to the proper person would vacate the policy. This court granted a new trial in that cause, in consequence of a supposed misdirection of Lord Tenterden. Lord Tenterden afterwards, in *Lindenau v. Desborough*, spoke in terms of approbation of the decision of this court, and in effect said that he considered the decision of this court as the rule which ought to guide him in giving his direction to the jury in that particular case. How is that case of *Morrison v. Muspratt* to be distinguished from the present? In that case, undoubtedly, the reference, as my brother Wilde has stated, was made by the assured; in this case, the reference made is not by the assured, but by the person whose life was insured. Then, is the assured affected by any misrepresentation of the person whose life is insured? In the case of *Maynard v. Rhodes*, that very point was decided by the Court of King's Bench. Colonel Lyon, the life insured by the plaintiff, in conformity with the regulations of the insurance office, attended to give the usual information as to the state of his health, and in the result the policy was effected. Colonel Lyon concealed or misrepresented a material circumstance touching his health. The learned judge told the jury, if they were satisfied that the representation made by Colonel Lyon was not substantially true at the time the policy was effected, the plaintiff would be bound by the consequences of such misrepresentation, although he himself was not privy to the falsehood. A motion was made for a new trial. The judgment is given by Mr. Justice Bayley, Mr. Justice Holroyd, and Mr. Justice Littledale. The first says, "I am of opinion that the direction of the lord chief-justice to the jury was correct in point of law." Mr. Justice Holroyd says, "If the jury were satisfied the representations made by Colonel Lyon himself were untrue, it can make no difference in the legal result whether the policy was effected for his benefit or not; it was a conditional policy, and the party for whose benefit it was effected must stand to the conse-

quences." Mr. \*Justice Littledale expresses himself as agreeing [\*750] with the other two judges.

This is a very recent decision at the Court of King's Bench expressly on this point; but if we look at the circumstances of the present case, I think we may decide this point on the general rule of law, that the principal is responsible for any representations made by his agent relating to the business in hand. For, has not the plaintiff, the assured, made Mr. House his agent for the purpose of this insurance? When Mr. Lye applies to the plaintiff, the plaintiff says, I can give no account, you must go and inquire who was Mr. House's medical attendant. And who could give him the best account?—to whom should he go?—who could give him direct and satisfactory information on the subject but Mr. House? Then, the assured must have known of the statement signed by Lye, because Lye swears that he showed him the paper, and that the other said, I dare say it is all correct. He either did know it or might have known it, which, as far as regards his responsibility, is the same thing as if he did know it. He knew that Mr. House had been asked the question—"To what medical practitioner do you refer the directors of the office as most competent to give evidence respecting your present and general state of health and constitution, and your habits of life?"—and that he had answered, "I refer to Mr. Vicary of Warminster." By suffering that paper to be handed in, he adopts that reference, and makes Mr. House his agent for the purpose of making the reference.

Is that a true and proper reference? Mr. Vicary of Warminster had never been House's medical attendant. But a medical man at Bath had attended him for some years, and could tell not only whether there was any incipient disease, but whether there were any habits which have a tendency to produce disease.

Without discussing the question whether habits of inveterate drunkenness have a tendency to produce disease or not, we may stop short here, and say, You have not referred to the medical attendant as you were required to do. The first count in the declaration states the policy of insurance: it then states the conditions, according to a clause by which it is "provided [\*751] \*that this policy and insurance hereby effected shall at all times and under all circumstances be subject to such conditions and stipulations as are contained in the printed conditions of life assurance indorsed hereon, in the same manner as if the same were actually repeated in the body of the policy, and adapted to this present case." One of those conditions is, that the names and residences of two gentlemen are to be referred to respecting the present and general state of the life of the insured—one to be the usual medical attendant of the party. The declaration in the cause then goes on to state, that all the conditions of the policy had been complied with, and, consequently, that there had been a reference to the proper medical man. Without proof of that the plaintiff could not recover in this action; and it is not an unnecessary allegation, because the declaration, in my opinion, would have been bad without it, for it would not truly have represented the contract between the parties. That contract is not confined to what is contained in the body of the policy, but embraces the conditions endorsed on it, and



embraces the representations required by those conditions. It was absolutely necessary to set out in the declaration that these conditions had been complied with. So far from that being proved, undoubtedly it was disproved. I am opinion, on this short ground that a nonsuit ought to be entered.

PARK, J.—In all actions on life assurance, I am quite clear every regard ought to be paid to the assured, because, in general, it is a provision for a family, or it is a provision for a *bona fide* debt, as I have no doubt it was in this case; for there is not the least imputation on the plaintiff in the cause; but, while one wishes to give every latitude and every indulgence to plaintiffs under such circumstances, it is absolutely necessary that in every case of this description there should be the purest good faith between the parties, and the most accurate representation of all material circumstances. Looking at this case in that point of view, I think there is nothing at all in the point that has been made. The case is merely this, that Mr. House's life being the subject of insurance, the plaintiff, who was to be benefited by that insurance, refers the agent of the \*office to make such inquiries as he can; the agent necessarily goes to the party who was to be the life insured. Was it [\*752] not, then, of course, that the plaintiff, who made the reference to this very man, because he was the person who could give the best information, should be bound by the representations House made concerning himself? And what does he say of himself? He is asked to refer to his usual medical attendant. He says, My usual medical attendant is Mr. Vicary of Warminster. But was there a word of truth in Mr. Vicary being his usual attendant? Mr. Vicary was examined, and it appeared he had never been his medical attendant. No matter, then, whether Dr. Harvey were a good medical attendant or not,—he was the person actually attending him, and his name was never mentioned. Then, is the plaintiff who effects the insurance to be bound by this? It seems to me that *Maynard v. Rhodes* is exactly in point. There is no distinction whatever between that case and the present, because there, the assured was as ignorant of anything like fraud, and as free from suspicion, as the plaintiff here; yet, it was held, he was bound by the representations of the life insured.

But it is said, this misstatement is not material, or not so material as the misstatement in the case of *Maynard v. Rhodes*. I do not agree in that. It is most material that the surgeon who has been in attendance on the life insured, if such a one there be, should be referred to. If he never had had a surgeon attending him, he might have said so; but if he had one, it was material he should be referred to, and the plaintiff knew it was material, otherwise he would not have declared in the manner he has done in this case, for he avers in his declaration the exact performance of this condition. Instead of alleging that the defendant had dispensed with that information, as, perhaps, he might have alleged, (if he could have proved it,) according to the principle recognized in *Jones v. Barkley*, Dougl. 684, he says, I have performed all the conditions hereinbefore recited. But he had not done so, for he had not referred to the usual medical attendant of the life insured.

[\*753] BURROUGH, J.—Here there is beyond all question a misrepresentation of a very material fact,—of the name of the person who attended the life insured. There was another person who had been used to attend him. Beyond all doubt that is a misrepresentation. At the bottom of the policy there is this phrase: “A declaration as to all the above points will be considered as the basis of the contract between the assured and the company. If such declaration be not in all respects true, the policy will become void.” One declaration is of “the name and place of residence of two gentleman to be referred to respecting the present and general state of health of the life to be insured,—one to be the usual medical attendant of the party.” Has the plaintiff complied with that? so far from it, there has been a misrepresentation of the fact by the life insured. Vicary was not his medical attendant. There was another person who had attended, and who would have disclosed habitual intoxication. This is not complying with the terms of the policy, and I think there ought to be a nonsuit.

GASELEE, J.—According to the terms of this policy, it is requisite that the names and residences of two gentleman should be referred to respecting the state of the life assured,—one the usual medical attendant of the party. Now, who is the person who can best disclose the name of such attendant? and does it not *ex vi termini*, almost import that the life assured himself shall be applied to to know who is his medical attendant? Mr. House, the life insured, was the person applied to here, and he has given a misrepresentation of that fact.

But it has been said he was not the agent of the plaintiff. The plaintiff said to Lye, Do you make the necessary inquiries, and I will sign the paper. Now, it appears to me, when that is coupled with what passed afterwards, viz., Lye's coming and beginning to read over the declaration, and to state what was in it, when the plaintiff cut him short, and said, he took it for granted it was right, that it does constitute House the agent of the plaintiff, and that he is bound by the misrepresentation of such agent.

That, therefore, appears to me to be a sufficient ground on which a nonsuit ought to be entered in this case. I agree with my brother Wilde, [\*754] that it was competent to the parties to have \*dispensed with this, or with any other of the conditions they thought fit. But suppose they had, should it not then, on the principle laid down in the case of Jones v. Barkley, referring to Kingston v. Pearson, have been said, “My declaration consisted of such and such particulars, which were required by the conditions, and I was ready to have declared and to have made it conformable to the policy, but the office did not insist on it, they dispensed with it, and they discharged me altogether from making it;” that is the allegation in Jones v. Barkley, where the party said he had made and executed some, and was ready and offered to do the rest, but the other party dispensed with the whole. Then the question would have been, Have they or not discharged them? I do not think my brother Wilde's point arises upon the record, or that it would have been competent to give in evidence, that they had dispensed with this condition,

requiring the name of the usual medical attendant. On this ground, I am of opinion there should be a nonsuit.

Rule absolute.

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False answers to verbal inquiries on matters material will avoid the policy, although the printed list of inquiries did not embrace such matters. In *Wainright v. Bland*, 1 M. and N. 33, a party effecting her assurance on her life, was asked by the actuary, Whether she had effected assurances at any other office? and she answered, "I wish to insure £5000, but as your office only takes £3000, I shall propose £2000 to some other office." It was afterwards discovered that she had previously effected insurances with various offices to the amount of £11,000. In the printed list of questions proposed by the office assuring, there was none as to assurances being effected with other offices. At her death the claim was resisted, and at the trial the judge left it to the jury to say, Whether the false representations made by the assured related to a matter material to be known by the assurers. The jury found that the false representation was a material point, and on a motion for a new trial the verdict was sustained.

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\*IN A LIFE POLICY CONTAINING A CONDITION THAT IT SHOULD BE VOID IF THE PARTY ON WHOSE LIFE THE ASSURANCE WAS EFFECTED SHOULD COMMIT SUICIDE, IT IS NOT NECESSARY THAT THE PARTY COMMITTING SUICIDE SHOULD BE A RESPONSIBLE MORAL AGENT, ABLE TO DISTINGUISH BETWEEN RIGHT AND WRONG, BUT IT IS SUFFICIENT IF HE INTENDED TO KILL HIMSELF, AND IF HE KNEW THAT THE PROBABLE CONSEQUENCE OF THE ACT DONE BY HIM WAS TO DEPRIVE HIMSELF OF LIFE. [\*755]

### CLIFT v. SCHWABE.

June. 16, 1846.—E. 3 M. G. & S. 437.

ASSUMPSIT upon a policy of assurance on the life of Louis Schwabe. The sixth condition of the policy was that it should be void if the person on whose life the assurance was effected should commit suicide, or die by duelling, or the hands of justice.

The defendants pleaded that the said Louis Schwabe did commit suicide, whereby the policy became and was void.

Upon this plea, issue was taken and joined.

The cause came on for trial before Cresswell, J., at the Liverpool summer assizes in 1845.

On the part of the defendants below, it was proved that Louis Schwabe, the assured, on the 10th of January, 1846, voluntarily took and swallowed a quantity of sulphuric acid, sufficient to occasion death, for the purpose of killing himself, and that he died on the following day, by reason of the taking and swallowing of such acid; and the witnesses who gave such evidence, on cross-examination by the plaintiff's counsel gave

evidence tending to show that Louis Schwabe, when he took the sulphuric acid, was of unsound mind.

The learned judge thereupon directed the jury—that, in order to find the said issue for the defendants, it was necessary that they, the jury, should be satisfied that Louis Schwabe died by his own voluntary act, being then able to distinguish between right and wrong, and to appreciate the [756] nature and quality of the act that he was doing, so as to be a responsible \*moral agent; that the burthen of proof as to his dying by his own voluntary act, was on the defendants, but that being established, the jury must assume that he was of sane mind, and a responsible moral agent, unless the contrary should appear in evidence.

To this direction, the counsel for the defendants below excepted, insisting that the learned judge ought to have charged the jury, as matter of law, that, if Louis Schwabe voluntarily took the sulphuric acid for the purpose of destroying life, being conscious of the probable consequences of the act, and having, at the time of so taking it, sufficient mind to will to destroy life, he had committed suicide, within the meaning of the sixth condition of the policy.

The jury returned a verdict for the plaintiff below, damages £5140, 13s. 9d. Judgment having been entered up for that sum, and costs, the defendants below brought a writ of error. The exceptions came on for argument in the exchequer chamber on the 4th of December, 1846, before Pollock, C. B., Parke, B., Alderson, B., Patteson, J., Rolfe, B., Wightman, J., and Coleridge, J.

Sir *F. Kelley*, solicitor-general, (with whom were *Martin* and *Unthank*), for the plaintiffs in error.—The learned judge was clearly wrong in the construction put by him upon the words of the condition in question—"every policy effected by a person on his or her own life, shall be void, if such person shall commit suicide, or die by duelling or the hands of justice." The words "shall commit suicide" do not possess any definite technical meaning; the real question is, What was the meaning of the contracting parties,—whether the office intended to provide against an event of frequent occurrence, or merely against the crime of felonious self-slaughter? The law upon the subject recently underwent very full discussion in the case of *Borradaile v. Hunter*, 5 M. and G. 639, 5 Scott, N. R. 418. There the policy contained a proviso, *inter alia*, that, in case "the assured should die by his own hands, or by the hands of justice, or in consequence of a duel," the policy should be void. The assured threw himself into the Thames and was drowned. Upon an issue, whether the assured died by his own hands, [757] \*the jury found that he "voluntarily threw himself into the water, knowing at the time that he should thereby destroy his life, and intending thereby to do so; but that, at the time of committing the act, he was not capable of judging between right and wrong." It was held by *Coltman*, *Erskine*, and *Maule*, JJ., *dissentiente* *Tindal*, C. J., that the policy was avoided, as the proviso included all acts of voluntary self-destruction, and was not limited by the accompanying provisos to acts of felonious suicide. It may be conceded that the word "suicide," in the sense in which it is here used, does not embrace self-killing by accident, or unintentional self-

destruction. But there is nothing in the context to restrain it to a felonious killing. Suicide may be felonious or otherwise, according to the circumstances, just as homicide may be felonious, or excusable, or justifiable. In 3 Inst., Lord Coke says, "*Homicidium, ex vi termini*, comprehendeth petit treason, murder, and that which is commonly called manslaughter, for, *homicidium est hominis cædium*, and *homicidium est hominis occisio ab homine facta*. Therefore, the right division of homicide is,—that of homicides or manslaughters, some be voluntary and of malice aforethought; as petit treason, and murder of another, and murder of himself; of manslaughters, some be voluntary, and not of malice aforethought; of these some be felony, and some be no felony; of which, some be in respect of giving back inevitably in defence of himself, upon an assault of revenge, and some without any giving back, as, upon the assault of a thief or robber upon a man in his house or abroad; some upon the assault of one that is under custody, as the sheriff or jailer assaulted by his prisoner. Some, in respect that he is an officer or minister of justice, without any assault, in the execution of his office, or lawful warrant. And lastly, some homicides that be no felony be neither forethought nor voluntary, as manslaughter by misadventure, *per infortunium*, or *casu*." In *Borradaile v. Hunter*, it was insisted, on the part of the plaintiff, at the trial, that to bring it within the condition of the policy, the act of suicide, or "dying by his own hands," must have been the intentional act of a sane man having the control of his will; but the learned judge who presided laid it down, most unexceptionably, as it is conceived,—“that if the \*assured by his own act intentionally [\*758] destroyed his own life, not only being conscious of the probable consequences of the act, but doing it for the express purpose of destroying himself voluntarily, having at the same time sufficient mind to will to destroy his own life, the case would be brought within the condition of the policy; but that if he was not in a state of mind to know the consequences of the act, then it would not come within the condition.” Insurance offices do not guarantee a man’s sanity. [POLLOCK, C. B.—It would be easy for them to say so.] Maule, J., in his judgment in *Borradaile v. Hunter*, says,—“A policy by which the sum insured is payable on the death of the assured in all events, gives him a pecuniary interest that he should die immediately, rather than at a future time, to the extent of the excess of the value of a present payment over a deferred one, and offers therefore a temptation to self-destruction to this extent. To protect the insurers against the increase of risk arising out of this temptation, is the object for which the condition in question is inserted. It ought, therefore, to be so construed as to include those cases of self-destruction in which, but for the condition, the act might have been committed in order to accelerate the claim on the policy, and to exclude those in which the circumstances, supposing the policy to have been unconditional, would show that the act would not have been committed with a view to pecuniary interest. This principle of construction requires and accounts for the exclusion from the operation of the condition of those cases, falling within the general sense of its words, to which it is admitted not to apply,—such as those of accident and

delirium." [POLLOCK, C. B.—Delirium is not inconsistent with the existence of intention. The question is, whether, in order to exclude the case from the condition, there must not be an entire absence of will or intention and understanding. If the party is not a responsible moral agent, can the act be said to be his act?] Erskine, J., in delivering, his opinion, in *Borradaile v. Hunter*, says,—“Looking simply at that branch of the proviso upon which the issue was raised, it seems to me that the only qualification that a liberal interpretation of the words, with reference to the nature of the contract, requires, is that the act of self-destruction should be the voluntary and wilful act of a man having at [\*759] \*the time sufficient powers of mind and reason to understand the physical nature and consequences of such act, and having at the time a purpose and intention to cause his own death by that act; and that the question whether at the time he was capable of understanding and appreciating the moral nature and quality of his purpose, is not relevant to the inquiry, further than as it might help to illustrate the extent of his capacity to understand the physical character of the act itself.” [POLLOCK, C. B.—The effect of that dictum seems to be this; that the act must be the voluntary act of the party, as opposed to involuntary, and that it must be the act of a being sufficiently intelligent to know what he is doing.] If the party voluntarily ended his life, knowing that such would be the consequence of the act he was committing, and intending to produce that result, it is quite immaterial, in the construction of this condition, whether he was or was not a responsible moral agent. [POLLOCK, C. B.—How can intention be predicated of a man *non compos mentis*?] If the construction of the policy depended upon the sanity or insanity of the assured, there would have been no necessity for putting to the jury the question that was put by Alexander, C. B., in *Garrett v. Barclay*, 5 M. and G. 643, 5 Scott, N. R. 422; for in his direction his lordship observes that beyond all doubt the assured was insane. It is one thing to say that a man is not a responsible moral agent, and another to say that he is incapable of volition. In *Kinnear v. Borradaile*, 5 M. and G. 644, 5 Scott, N. R. 424, as in *Garrett v. Barclay*, the words of the condition were the same as those in the present case. In *Kinnear v. Nicholson*, 5 M. and G. 644, 5 Scott, N. R. 425, the words were the same as those in the policy in *Borradaile v. Hunter*; and yet, so slight was thought to be the distinction between them, that it was agreed between the parties that *Kinnear v. Nicholson* should abide the event of *Kinnear v. Borradaile*. [POLLOCK, C. B.—Mr. Justice Erskine seems to have considered the difference of expression to be important; for he says,—“When I find the terms ‘shall commit suicide,’ that have been popularly understood and judicially considered as importing a criminal act of self-destruction, exchanged for terms not hitherto so construed, it may, I think, be fairly inferred that the terms adopted [\*760] were \*intended to embrace all cases of intentional self-destruction, unless it can be collected from the immediate context, that the parties used them in a more limited sense.” Two of the judges, therefore, in that case, would have been in favour of the plaintiff, if the words of the condition had been the same as those here used.] If the

act be intentional, though the result of a perverted will, it is still suicide within the meaning of this policy. Lord Coke, Hale, Hawkins, and Blackstone, in treating of suicide, all consider the term applicable equally to self-slaying feloniously, or *per infortunium*, or otherwise. With regard to the rule of construction that was somewhat relied on by Tindal, C. J., in *Borradaile v. Hunter*, *noscitur a sociis*, even assuming it to be applicable here, it does not aid the argument; for, acts that are lawful, such as going upon the high seas, or beyond the limits of Europe, are in this proviso placed in juxtaposition with unlawful acts. [ALDERSON, B.—A man may die by the hands of justice, and yet he may not be justly condemned.] Exactly so. Some force will also be attempted to be given to the word “commit,” which, it will probably be said, implies criminality. There are, however, many instances of the use of that word in a manner in no degree importing criminality or illegality; for instance, in pleading, a man is said to commit a trespass in the assertion of a right of way, or to commit an assault in protection of himself or of some one he is bound to protect.

*J. Henderson*, (with whom were *Knowles* and *Crompton*,) for the defendant in error.—The main question in this case is, What is the true construction of the words “shall commit suicide,” as used in this instrument? If they necessarily import an act of criminality, the direction of the learned judge to the jury cannot be impeached. The word “suicide” is a word of comparatively modern introduction. Most of our text writers use it as synonymous with *felo de se*. Thus, in Hale’s Pleas of the Crown, it is said,—“*Felo de se*, or suicide, is, where a man of age of discretion, and *compos mentis*, voluntarily kills himself by stabbing, poisoning, or any other way. No man hath an absolute interest of himself: but 1, God Almighty hath an interest and property in him, and therefore self-murder is a sin \*against God; 2, The king hath an interest in him, and therefore the inquisition in case of self- [\*761] murder is, *felonice et voluntarie seipsum interfecit et murtheravit, contra pacem Domini Regis*. If he loses his memory by sickness, infirmity, or accident, and kills himself, he is not *felo de se*, neither can he be said to commit murder upon himself or any other. If a man gives himself a mortal stroke while he is *non compos*, and recovers his understanding, and then dies, he is not *felo de se*; for, though the death completes the homicide, the act must be that which makes the offence. It is not every melancholy or hypochondriacal distemper that denominates a man *non compos*; for there are few who commit this offence but are under such infirmities; but it must be such an alienation of mind that renders them to be madmen or frantic, or destitute of the use of reason; a lunatic killing himself in a fit of lunacy is not *felo de se*.” And he adds,—“It must be simply voluntary, and with an intent to kill himself.” So Lord Coke says,—“If a man lose his memory by the rage of sickness or infirmity, or otherwise, and kill himself while he is not *compos mentis*, he is not *felo de se*; for, as he cannot commit murder upon another, so in that case he cannot commit murder upon himself. If one during the time that he is *non compos mentis* give himself a mortal wound, whereof he, when he hath recovered his memory, dieth, he is not *felo*

*de se*: because the stroke which was the cause of his death, was given when he was not *compos mentis: et actus non facit reum, nisi mens sit rea*." And Blackstone says, 4 Bl. Comm. 189,—“A *felo de se* is he that deliberately puts an end to his own existence, or commits an unlawful malicious act, the consequence of which is his own death; as if, attempting to kill another, he runs upon his antagonist's sword; or, shooting at another, the gun bursts and kills himself. The party must be of years of discretion, and in his senses, else it is no crime.”—[ALDERSON, B.—*Felo de se* no doubt is included in suicide; but the question is, whether the expression here used is confined to criminal suicide or *felo de se*.] In Dr. Johnson's Dictionary, “suicide” is defined “self-murder; the horrid crime of killing one's-self.” Putting a fair and reasonable construction upon the whole of this instrument, it is impossible to hold that anything short of a criminal act of self-destruction, was in the [\*762] \*contemplation of the parties. The very form of the expression, to “commit suicide,” imports a deliberate and rational exercise of the will: it is as if the words had been “commit the crime of suicide.” In the eye of the law, an insane person can have no will or intention. The civil law, it is true, makes a distinction between *demens* and *furiosus*: but the law of England knows no degrees of insanity. “The law,” as was observed by Sir J. Jekyll, in the Duchess of Cleveland's case, “will not measure the sizes of men's capacities, so as they be *compotes mentis*.” [POLLOCK, C. B.—If a man is *non compos mentis*, he is beyond the reach of the law. How can it be predicated of one insane person that he is capable of willing to do an act, and of another that he is not? The imperfection of language compels us to use expressions that are very inapt.] [ALDERSON, B.—An insane person is one who has no dominion over his will.] The argument on the other side,—that the policy is avoided, if the assured, at the time of committing the act which terminated so fatally, had mind enough to know what he was about, and to contemplate and intend the consequence that resulted,—suggests a distinction which the law repudiates. [PARKE, B.—Lord Hale distinctly points out the degrees of insanity.] The learned judge in this case adopted the test suggested by the opinion of the majority of the judges delivered to the house of lords, in answer to the questions arising out of McNaughton's case. If any doubt arises from the ambiguity of the instrument, the inconvenience must be borne by the assurers, whose language it is. The opinions of two of the judges in *Borradaile v. Hunter*, upon the import of the words here used, support the direction in this case, and those of the other two are not at all inconsistent with it. The test there proposed by Maule, J., is that which should guide the decision of the present case. “In construing these words,” says that learned judge, “it is proper to consider, first, what is their meaning in the largest sense, which, according to the common use of language, belongs to them; and if it should appear that that sense is larger than the sense in which they must be understood in the instrument in question; secondly, what is the object for which they are used. [\*763] They ought not to be extended beyond their ordinary sense, in order to comprehend a case within their object; for, \*that would



be to give effect to an intention not expressed; nor can they be so restricted as to exclude a case both within their object and within their ordinary sense, without violating the fundamental rule which requires that effect should be given to such intention of the parties as they have used fit words to express. The words in question, in their largest ordinary sense, comprehend all cases of self-destruction, and certainly include the case of the present testator; but as it is admitted that, in their largest sense, they comprehend many cases not within their meaning as used on the present occasion, it is to be considered whether the case of the testator falls within the object for which they are used in this policy." The cases of *Garrett v. Barclay*, *Kinnear v. Borradaile*, and *Kinnear v. Nicholson*, have little or no bearing upon the present.

Sir *F. Kelly*, solicitor-general, in reply.—Lord Hale treats both suicide and homicide as including a killing *per infortunium*. As well might it be said that homicide, in the abstract, can only mean felonious homicide, as that suicide can only mean *felo de se*. If dictionaries are to be relied on, Richardson distinctly puts it in the alternative; for he defines "suicide" as "the slaying of himself, or self-murder." The word "commit" clearly does not advance the argument on the part of the defendant in error. It is not necessarily confined to the doing a thing that is criminal or unlawful. [POLLOCK, C. B.—Suicide *per infortunium* is clearly not intended by this policy. Hale's view excludes suicide by a reasonable man.] The whole extent of the doctrine laid down by Hale, is, that a man who is *non compos mentis* cannot be *felo de se*.

*Cur. adv. vult.*

There being a difference of opinion amongst the judges who were present at the argument, their judgments were given *seriatim*, as follows:—

WIGHTMAN, J.—I am of opinion, upon the best consideration I can give to this case, that the direction of the learned judge to the jury upon the trial of the cause was right, and that the \*deceased Louis Schwabe did not, under the circumstances found by the [\*764] jury, commit suicide, within the meaning of the policy of assurance upon his life. The exception or proviso in the policy is in these terms:—"Every policy effected by a person on his own life shall be void if such person shall commit suicide, or die by duelling, or the hands of justice." The defendants below pleaded that Schwabe, whose life was insured by himself, did commit suicide, which was denied by the plaintiff in the action. The evidence was, that the deceased voluntarily took poison in sufficient quantity to cause death, for the purpose of killing himself, but that he was, when he took the poison, of unsound mind. The learned judge told the jury, that, to find a verdict for the defendants below, they must be satisfied that the deceased died by his own voluntary act, being then able to distinguish between right and wrong, and to appreciate the nature and quality of the act that he was doing, so as to be a responsible moral agent. To this direction a bill of exceptions was tendered, it being contended on behalf of the defendants, that it was sufficient to entitle them to a verdict, if the deceased had sufficient mind to intend to kill himself, and to know that the poison would probably have that effect, and that he took the poison with that intent,

though he might be unable to distinguish between right and wrong, or to appreciate the nature and quality of the act he was doing, so as to be a responsible moral agent. The question therefore is, whether by the word "suicide," as used in the policy, a criminal killing of himself, such as could only be committed by a responsible moral agent, was intended; for, if it was, the direction of the learned judge and the verdict of the jury were right, otherwise not.

The term "suicide" has no technical or legal meaning: it is derived from the Latin; but the compound word *suicidium*, from which the English word is said to be derived, is not to be found in any Latin dictionary or glossary that I have met with. It is admitted that the word is not to be understood in the largest sense of which it is capable, as that would include an accidental or unintentional killing of himself. We must, therefore, consider the ordinary meaning of the word in the English language, and connect such ordinary meaning with the apparent

[\*765] \*object and intent of the proviso in the policy in which it occurs. In all the English books in which it occurs, legal or other, it is almost invariably used to denote a criminal act. In Johnson's Dictionary, "suicide," when used as denoting an act, is said to mean "self-murder," "the horrid crime of destroying one's-self;" and when used as denoting a person is said to mean "a self-murderer." In Webster's Dictionary the same meaning is given; and so in Rees's Encyclopædia, and in the Encyclopædia Britannica. Blackstone, in the 4th volume of his Commentaries, p. 189, uses the term "suicide" as meaning a *felo de se*. He says,—“As the suicide is guilty of a double offence, one spiritual and the other temporal, the law has ranked it amongst the highest crimes.” Innumerable instances might be given to show that the word "suicide" is almost invariably used in the English language in a criminal sense, and that such is the meaning of the word in its general and ordinary acceptation. If that be so, is there anything in the policy, or the terms of it, to show that it is used in the proviso in question, not in the general and ordinary sense, but in another, of which it is capable, though unusual?

The word is used in a disqualifying proviso, by which, under certain circumstances, the insurance and the premiums paid are forfeited and the benefit of the policy lost. The usual rule is, to look strictly at the terms of such provisos, and not to extend them beyond their ordinary meaning; but, in the present case, if the ordinary meaning of the term "suicide" were more uncertain than it seems to be, the terms used in the proviso itself, in connexion with it, tend to show the sense in which the insurers, whose word it is, intended it should be used. The policy is to be void, if the person "shall commit suicide, or die by duelling, or by the hands of justice." The three excepted modes of death are classed together in one exception or proviso, and two of them are unquestionably the consequences of crime; and if the maxim *noscitur a sociis* applies, it strongly tends to show that the third is used in a criminal sense also. In *Borradaile v. Hunter*, 5 M. and G. 639, 5 Scott, N. R. 418, which was cited upon the argument, Erskine, J., who agreed with the majority of the judges, says, as one of the grounds for his judgment in

that case—"When I find the terms 'shall commit \*suicide,' that have been popularly understood and judicially considered [766] as importing a criminal act of self-destruction, changed for terms not hitherto so construed, it may, I think, be fairly inferred that the terms adopted were intended to embrace all cases of intentional self-destruction, unless it can be collected from the immediate context, that the parties used them in a more limited sense." And the Lord Chief-Justice Tindal, in his judgment in the same case, says,—“If the exception had run in the terms 'shall die by suicide, or by the hands of justice, or in consequence of a duel,' surely no doubt could have arisen that a felonious suicide was intended thereby." I refer to these passages in the judgments of these learned judges, as showing their understanding of the meaning of the term "suicide," when used in such an exception, and in connection with such other terms as occur in the present case.

I forbear to speculate upon the probable object of the insurers in introducing such a proviso. It can hardly be because such modes of death as these excepted, are events not to be calculated upon; for there is no doubt but that the probabilities of such events are as well calculated as any other; and, moreover, those modes of death are not excepted where the policies are for the benefit of others. It may be that the exception in case of suicide was introduced to meet the case of a person insuring his life with the intention of committing suicide, in order to benefit his family; or, it may be that the insurers were influenced by some higher motive, and wished to check such modes of death as those excepted. Either of these objects would seem to indicate that the word "suicide" was used in its ordinary sense, importing a crime. But as no satisfactory result can be drawn from such a speculation, it is better to judge of the case merely by the ordinary sense of the language used in connection with the other terms which are used along with it. Upon the whole, then, it seems to me that there is nothing in this case to show an intention on the part of the insurers to use the word "suicide" in a more extended sense than that which is ordinarily and popularly attributed to it; and that, on the contrary, the context shows that it was their intention to use it in the ordinary and popular sense, and that they have so used it; and, \*consequently, that the direction of the judge was [767] correct, and that the defendant in error is entitled to judgment.

ROLFE, B.—The question in this case is very short. Louis Schwabe, in the year, 1836, insured his own life for £999, in an office of which the plaintiffs in error were the directors liable to be sued for money becoming due on the policies of insurance. The policy by which the £999 was insured, contained a clause in these words:—"Every policy effected by a person on his own life, shall be void, if such person shall commit suicide, or die by duelling or the hands of justice." Schwabe died in 1745, and the defendant in error obtained letters of administration, and then sued the plaintiffs in error in action of assumpsit for the £999 secured by the policy. The plaintiffs in error pleaded that Louis Schwabe did commit suicide whereby the policy became void. On this issue was joined. The issue was tried before my brother Cresswell, at the Liverpool summer assizes last year; and on the part of the plaintiffs

in error witnesses were called to prove that Schwabe's death was caused by his having voluntarily, and for the purpose of killing himself, swallowed a quantity of sulphuric acid; and the same witnesses also gave evidence tending to show, that, at the time of his so swallowing the said sulphuric acid, Louis Schwabe was of unsound mind. My brother Cresswell, in summing up the case to the jury, told them, that in order to find the issue for the plaintiffs in error, they must be satisfied that Schwabe died by his own voluntary act, being then able to distinguish between right and wrong, and to appreciate the nature and quality of the act he was doing, so as to be a responsible moral agent. To this ruling the plaintiffs in error have excepted; and we have therefore to say whether that ruling was right; and this depends on the meaning of the words in the policy "shall commit suicide." If they mean, "shall destroy his own life under circumstances which will make him a *felo de se*," then the ruling was right; if they mean merely "shall intentionally kill himself," then the ruling was wrong.

The word "suicide" is not, as it appears to me, a word of art, to which any legal meaning is to be affixed different from that which it is [\*768] popularly understood to bear. The authorities \*referred to by the defendant in error, as showing that suicide means the felonious taking away of a man's own life, do not at all bear out his proposition. Lord Hale, indeed, in the thirty-first chapter of his *Pleas of the Crown*, vol. i. p. 411, certainly speaks of *felo de se* and suicide as convertible terms, and defines both the one and the other as being, where a man of the age of discretion, and *compos mentis*, voluntarily kills himself. But it appears to me plain, from the whole context of the passage in question that Lord Hale did not understand that he was giving a definition of the term suicide, except as it was often used to mean the same thing as *felo de se*; and this seems manifest from the fact, that what in the passage in question he calls suicide, he a few lines above designates as *homicidium sui ipsius*. Now, there can be no doubt but that a man who takes away the life of another commits homicide, even though the act was justifiable, or may have happened entirely *per infortunium*, and was therefore not criminal at all, see Hale, P. C. c. 39. And therefore, taking suicide as meaning the same thing as homicide of one's-self, it seems to follow that, in the opinion of Lord Hale, neither guilt nor moral responsibility is necessarily involved in its legal definition.

The passage to which we were referred in 4 Bla. Com. 189, seems strongly to show that suicide does not, in the opinion of that learned judge, necessarily include the notion of moral responsibility. The learned commentator, after stating that the party who destroys himself is not *felo de se* unless he was in his senses, adds that coroners' juries are apt to push this principle too far, and to hold that the very act of suicide is evidence of insanity. It is plain that the word suicide is there used as designating the mere act of self-destruction, otherwise the passage would be insensible.

The only other authority referred to in which the word "suicide" occurs, is the recent case of *Borradaile v. Hunter*, 5 M. and G. 639, 5 Scott, N. R. 418, which was an action, like this, on a policy of insurance, in

which was a stipulation making it void, not as in this case if the party should commit suicide, but if he should "die by his own hands." There a majority of the court held that the assured, having intentionally destroyed himself, though he was at the time incapable of distinguishing between \*right and wrong, the policy was void. Tindal, C. J., [\*769] differed from the rest of the court; and at p. 668, of his judgment, the following passage occurs:—"The expression 'dying by his own hand,' is in fact no more than the translation into English of the word of Latin origin, 'suicide;' but if the exception had run in these terms—'shall die by suicide, or by the hands of justice, or in consequence of a duel,' surely no doubt could have arisen that a felonious suicide was intended thereby." This, though it certainly shows that Tindal, C. J., would, from the context, have interpreted the word "suicide" in this policy as he did the words "die by his own hands," in *Borradaile v. Hunter*, as referring only to cases of self-destruction perpetrated by persons of sound mind, yet shows also that he did not think that to be the necessary or natural meaning of the word suicide standing alone. The distinction between felonious suicide and suicide not felonious, taken and observed on by that learned judge, seems exclusively to show, that, in his opinion, suicide did not necessarily, *ex vi termini*, import a criminal act, and therefore the act of a responsible moral agent; and in the same case, near the bottom of page 688, Erskine, J., speaks of criminal suicide, showing that he took the same view of the meaning of the word suicide as was taken by the lord chief-justice. All these authorities seem to me to favour my interpretation of this word.

But after all, our decision must rest entirely on what is the ordinary meaning of the term. In my opinion, every act of self-destruction is, in common language, described by the word "suicide," provided it be the intentional act of a party knowing the probable consequence of what he is about. This is, I think, the ordinary meaning of the word; and I see nothing in the context enabling me to give it any but its ordinary signification.

For these reasons, I think that a *venire de novo* must be awarded.

PATTESON, J.—The sole question is, What is the true meaning of the words "commit suicide," in the policy in question?

It is argued, first, that these words have a technical meaning, and import a felony.

\*No authority is cited for this position; no case in which the finding of a jury that A. had "committed suicide," has been [\*770] held equivalent to a finding that A. had "murdered himself," or that A. was "a felon of himself." I apprehend that the word *murdravit* was as necessary in a case of *felo de se*, as in the case of the murder of another person; and unless some records could be found, or some decisions of the courts, in which the word "suicide" has been held to have the same meaning as "self-murder," I am at a loss to know what ground there is for saying that the words "commit suicide" have any technical meaning.

It is argued, secondly, that the words, in their ordinary acceptation, import felony.

Now, the word "suicide," literally translated, means only "killing  
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himself or herself;" the circumstances attending the act manifestly cannot affect the literal meaning of the word.

Reference is made to Hale's Pleas of the Crown, where Lord Hale, in speaking of the different kinds of murder, speaks of suicide—*felo de se*. No doubt he does; but he is treating of criminal suicide only; and he nowhere intimates that the word "suicide" in itself imports criminal suicide. Johnson's Dictionary and Richardson's Dictionary are also referred to; but they are of very little weight when the court is considering what the parties to a contract mean by the words they have used. The word "commit" is said always to be used in a bad sense; be it so; but how does that prove that it communicates the quality of felonious to the word "suicide?" No suicide is good or meritorious; it must always be spoken of in a bad sense, however pitiable, or, one may hope, excusable, the circumstances of it may be.

But it is argued, thirdly, which is the true question, that a felonious suicide only is pointed at by this policy, and that this appears by the words themselves, and by the context.

Now, the words themselves are large enough to embrace all self-destruction as well as self-murder; not, indeed, as was admitted in *Borradaile v. Hunter*, to embrace cases of mere accident, or of insanity extending to unconsciousness of the act done, or of its physical consequences; because such cases, although comprehended in the very words themselves, [\*771] cannot be considered to have been in the contemplation of the contracting parties, but clearly embracing an act of self-destruction committed by a person who was aware of the probable consequence of the act, and intended that consequence to follow. The context in this case, as in *Borradaile v. Hunter*, is, "or die by duelling or the hands of justice," except that, in that case, the words were "die by his own hands, or by the hands of justice, or in consequence of a duel," so that the verb "die" applied to all the members of the sentence, whereas here the words "commit suicide" are complete as a sentence, without any word taken from the other part. I do not know that this makes any difference. It is true that the other two modes of death appear to be connected with felony; yet I apprehend that the actual felony is no part of the cause of exception from liability. If it were, it would be competent to the plaintiff to prove that the deceased, although dying by the hands of justice, was in truth innocent of the crime for which he suffered; in the same manner as it is no doubt competent to an executor to traverse an inquest of *felo de se*, found upon view of the body of his testator, by a coroner's jury; or that the deceased, although killed in a duel, had fired his pistol in the air, and never contemplated shooting at his opponent. Such defences would surely be excluded; for the words of the exception are express—"die by the hands of justice," whether justly or not, "or by duelling," whether it were felony or not. It seems, in truth, that the exception is not framed with reference to the commission of any felony or crime; but to guard against the time for payment of the sum insured being accelerated by the voluntary act of the party interested in the money. It is equally so accelerated by voluntary act, if the deceased knew the consequences of his act, and intended them to follow, whether

he was sane or under some delusion as to the moral quality of the act done. That the voluntary act of the party interested, and not the felony, is the thing contemplated by the exception, is further apparent from the circumstance that the clause in the policy goes on to do away with the exceptions altogether, when the deceased has parted with all interest, either for himself or his family, by assigning the policy, and where the deceased has mortgaged or charged it for the benefit \*of creditors, to do away with the exception to the extent of the sum [\*772] secured; yet felony would be committed in those cases just as much as if the policy had not been assigned.

I do not inquire into the reason of this qualification of the exception in the policy,—whether it has anything to do with the removal from the deceased of temptation to destroy himself when he has parted with his interest or not; or whether it is inserted as an inducement to those who want to raise money, to effect policies at this office, or what other reason may be conjectured. It is sufficient for my purpose that it tends to show that the contracting parties did not regard the commission of felony, as such, in their contract.

Upon the whole, I am of opinion that the words “commit suicide” mean only “kill himself;” and that the true question to be put to the jury is that which was put by Erskine, J., in *Borradaile v. Hunter*, Whether the deceased knew the probable consequences of his act, and did that act voluntarily, intending such consequences to follow; and that no question should be put as to the act done being criminal or not.

It follows that, in my opinion, the judgment must be reversed, and a *venire de novo* awarded.

ALDERSON, B.—I also am of opinion that there ought to be a *venire de novo* in this case; and I shall say but a very few words upon the points raised.

The true principle governing cases of this sort seems to be very well laid down by my brother Maule in *Borradaile v. Hunter*. The words in question seem to me in this case to have their proper construction, when taken as including all cases of voluntary self-destruction. They do not apply to cases in which the will is not exercised at all; as, where death results from accident or delirium; but where the self-destruction is voluntary, although the will may be perverted. It seems to me, therefore, that the argument arising out of the peculiar use of the word “suicide” in this contract is fallacious; and that the word is often used in its most extended sense, that, namely, which has been assigned to it on behalf of the plaintiffs in error. For instance, to take so common a book as the *Encyclopædia Britannica*, under the head of “suicide,” I find [\*773] \*this observation: “The general causes of suicide are twofold—insanity and crime.” So that the word “suicide” has often, in its ordinary acceptation in the English language, that enlarged sense; and it is not therefore to be confined to cases of criminal intention alone. Then reliance is placed upon the words in the company of which the word “suicide” is found in the policy—“death by duelling or by the hands of justice.” I doubt, however, whether that argument carries the case much further. Suppose a person insured were to die in a duel, I do not

conceive it would be competent to his representatives to say that he was insane at the time. Cases may easily be suggested in which a duel might be fatal, and yet not felonious; such as a duel in the course of war, or the like.

The case, however, has been so fully gone into by those learned judges who have immediately preceded me, that I shall do no more than express my concurrence with their judgments.

PARKE, B.—The question in this case may be very shortly stated. By the terms of the policy all the conditions and regulations indorsed are incorporated in it; and one of those, the sixth, is, that every policy effected by a person on his own life, shall be void, if such person shall commit suicide, or die by duelling or the hands of justice; and there is a plea that the intestate did commit suicide.

On the trial, my brother Cresswell told the jury, "that in order to find the said issue for the defendants, it was necessary that the said jury should be satisfied that Schwabe died by his own voluntary act, being then able to distinguish between right and wrong, and to appreciate the nature and quality of the act that he was doing, so as to be a responsible moral agent; that the burthen of proof as to his dying by his own voluntary act, was on the defendants, but that being established, the jury must assume that he was of sane mind, and a responsible moral agent, unless the contrary should appear in evidence."

The question is, whether this direction was correct. I agree with the majority of the judges who have preceded me, that part of the direction, viz., that as to the necessity of his being a responsible moral agent, was [ \*774 ] wrong; for I think that, according \*to the proper construction of this policy, if the intestate voluntarily killed himself, it was immaterial whether he was then sane or not.

This being a written contract between the parties, the construction of it belongs to the court; and the court must adopt the usual rules, and construe the provisos or conditions, as well as the other parts of the instrument, according to the ordinary meaning of the language used; except that terms of art, or technical words, must be understood in their proper sense, unless the context controls or alters their meaning; ancient words may be explained by contemporaneous usage, and words which have acquired a peculiar sense, by usage, in particular districts, occupations, or trades, must be read, (the usage being found by the jury,) in their acquired sense.

Here there is no occasion for any of these exceptions in construing this instrument. The two latter are inapplicable; and there is no ground for saying that the word "suicide" is a legal technical term, or word of art. An inquisition stating that the deceased committed suicide, would be clearly informal and bad. Nor have we a decision of any court on the meaning of these precise words, by which we should consider ourselves bound. The case of *Borradaile v. Hunter*, 5 M. and G. 639, 5 Scott, N. R. 418, certainly is not such; nor can the intimation of the opinion of the lord chief-justice, Tindal, by way of illustration of his argument, as to the meaning of the expressions now under consideration, have the same effect as a decision.



The whole question resolves itself into an inquiry as to the sense of words used in the ordinary language of the present day, the instrument to be construed bearing date in the year 1836; and we are all perfectly competent to form an opinion upon such a subject, and need not refer to lexicographers or authors, ancient or modern. If the case depended on the explanation given by dictionaries, the result, nevertheless, would be the same. Johnson, indeed, explains the word "suicide" by "self-murder, the horrid crime of self-murder," which, no doubt, it includes; Webster, as both "self-murder" and "the act of designedly destroying one's-self," and adds, to constitute suicide the person must be of years of discretion, and refers to Blackstone inaccurately; for the passage in that author applies \*to persons being *felo de se*; Richardson, [\*775] who states them to be words of modern formation, as "the slaying of himself, or self-murder." But the question does not depend upon the opinion of such authors; for, though they are authorities, they are not conclusive; the case turns on the meaning of the vernacular language which we now use; and I must own that I feel no doubt as to the import of the expression "commit suicide." In ordinary parlance, every one would so speak of one who had purposely killed himself, whether from *tædium* of life, or transport of grief, or in a fit of temporary insanity. To die by his own hands, or to commit suicide, seems to me to be all one, and to apply to all cases of voluntary self-homicide; and I do not see any reason why a different sense to the ordinary one should be attributed to these words in this instrument; on the contrary, I see very good ground for believing that they are used in their ordinary sense, in order to avoid the consequence which would have followed the adoption of such words as "committing felony of himself," or "self-murder;" as it may be well supposed that juries would, in favour of the family of the deceased, take the same lax view of the evidence as coroners' juries generally do.

I think that the judgment ought to be reversed, and a *venire de novo* awarded.

POLLOCK, C. B.—I regret that I differ from the majority of the court who have already delivered their opinions; but as, after the fullest deliberation, I feel compelled to come to the conclusion that the direction of my brother Cresswell to the jury at the trial was correct in point of law, and that the plaintiff below is entitled to our judgment, it is my duty, with whatever reluctance and hesitation, to state my own view of the case, and the reasons upon which that conclusion is founded.

The question, in point of form, has been so clearly stated already that it is unnecessary to state it again; but in substance it is, What is the meaning of the words "commit suicide" in the policy in question?—does the expression mean and include that the party was *compos mentis*? that he was a responsible being, capable of distinguishing right from wrong, as stated by my brother Cresswell? or is the expression applicable \*to a person who intentionally produces his own death (that is, [\*776] uses the means of destruction, with a knowledge of the effects they will produce, and with the intention of producing them,) but whose understanding, or judgment, or will, is so perverted by disease that he

has ceased to be responsible criminally for his conduct?—in short, who is insane (possibly) upon every other point but the physical effects of using a deadly weapon, or the result of applying adequate means to produce the destruction of life?

In considering the question, everything turns on the meaning of the words as ordinarily occurring in the English language and in English authorities, and especially in books written on law or morals.

Now, what is the meaning of the word "suicide," merely as an English word, according to the best authorities? Does it mean the killing of one's-self, in the same way as "homicide" means simply the killing of a human being, whether by accident, negligence, or in self-defence? or does it imply a criminal taking away of one's own life?

The word is of modern origin: it does not occur in the Bible, or in any English author before the reign of Charles II., probably not till after the reign of Anne. As far as I have been able to trace it, it first occurs as an English word in Hale's Pleas of the Crown. Hale was a judge during the Commonwealth, and died in 1676. His work was published in 1736. It is not in Hawkins, first published in 1716; but it is to be found in Blackstone. These, as legal authorities, will be adverted to presently; but I wish to notice first the authorities not legal.

The meaning assigned to the word by Johnson, in his Dictionary, is "self-murder—the horrid crime of destroying one's-self—a self-murderer;" and he gives no other signification. In Richardson's Dictionary it is, "the slayer of himself;" also, "the slaying of himself—self-murder." In the Dictionnaire Universel of the French language, published in 1771, it is said that the word was introduced into the French language by the Abbe Desfontaines; and a quotation is given from his works, where it is manifestly used in the sense given to it by Johnson. Desfontaines was born in 1685, and died in 1745.

[\*777] \*In the year 1644, was published with the works of John Donne (the poet,) Dean of St. Paul's, who died in 1631, his *Blaſphavars*, a Declaration on that Paradox or Thesis that self-homicide is not so naturally sin, that it may never be otherwise." The word "suicide" does not occur in this work, from which it may be presumed that it was not then in general use, and perhaps was not in use at all.

In 1785, Archdeacon Paley published his work on The Principles of Moral and Political Philosophy. The 3d chapter of book iv. is on "Suicide." Throughout that chapter the word is used as denoting the act of a reasonable, moral, and responsible agent, and in no other sense.

In 1790, Charles Moore, M.A., Rector of Cuxton, in Kent, published "A full Enquiry into the subject of Suicide, to which are added (as being closely connected with the subject) two Treatises on Duelling and Gaming." Page 4 contains the following passage:—"There are points, then, to be settled, and exceptions to be made, previous to a general charge of guilt on all who put a sudden end to their own lives. For, though every person who terminates his mortal existence by his own hand commits suicide, yet he does not therefore always commit murder, which alone constitutes its guilt. Some distinction is necessary in regard to a man's killing himself, as it would be had he killed another person; which

latter he may do either inadvertently or legally, and therefore in either case innocently, and without the imputation of being the murderer of another. When a man kills himself inadvertently or involuntarily, it comes under the legal description of accidental death, or *per infortunium*; but as to his doing it legally, the law allows of no such case. The only instance of innocence which it allows to the commission of voluntary suicide is in the case of madness; when a man being deemed under no moral guidance, can be subject to no imputation of guilt on account of his behaviour to himself or others."

In the *Encyclopædia Britannica*, the explanation of the word "suicide" is "the crime of self-murder," or "the person who commits it." There is a treatise on law in the *Encyclopædia Metropolitana*, in which suicide is spoken of: it is in the 2d volume of pure sciences, p. 711, "On Offences against Self." \*Speaking of the cases where society [778] may interfere to prevent or punish, the writer says,—“This observation applies to suicide—the greatest offence a man can commit against himself.”

These are all the lay authorities I think it necessary to refer to. But there are legal authorities, which, if unopposed by other and greater authorities, I should deem binding and conclusive upon the subject in a court of law.

Hale, in the work already alluded to, defines *felo de se*, or suicide, to be “where a man of the age of discretion, and *compos mentis*, voluntarily kills himself, by stabbing, poison, or any other way.” Judge Blackstone, in his *Commentaries*, first published in 1765-1768, uses the word in connection with self-murder, and in the same sense as Hale, 4 Bl. Comm. 189. In Burn’s *Ecclesiastical Law*, first published in 1760, it is said,—“By the rubric before the burial office, persons who have laid violent hands upon themselves shall not have that office used at their interment. And the reason thereof given by the canon law is, because they die in the commission of a mortal sin; and therefore this extendeth not to idiots, lunatics, or persons otherwise of insane mind, as children under the age of discretion, or the like. So also not to those who do it involuntarily, as where a man kills himself by accident; for in such case it is not their crime, but their very great misfortune.” The 4 Geo. II. c. 52, relates only to *felo de se*; but the editor says, “Suicides are to be buried in the churchyard at night; but no service is to be performed over them.” In Jacob’s *Law Dictionary*, in the edition of 1772, under title “Suicide,” reference is made to title “Self-murder;” where it is said that “self-murder is ranked amongst the highest crimes, being a peculiar species of felony,—a felony committed on one’s-self. The party must be in his senses, else it is no crime. In this as well as all other felonies the offender must be of the age of discretion, and *compos mentis*; and therefore an infant killing himself, under the age of discretion, or a lunatic during his lunacy, cannot be a *felo de se*.” Blackstone says,—“Self-murder, the pretended heroism, but real cowardice of the stoic philosophers, who destroyed themselves to avoid those evils which they had not fortitude to endure, though the attempting it seems to be countenanced by the

[\*779] civil law, yet was punished by the Athenian law with cutting off the hand which committed the desperate deed. And also the law of England wisely and religiously considers that no man hath a power to destroy life but by commission from God, the author of it; and, as the suicide is guilty of a double offence,—one spiritual, in invading the prerogative of the Almighty, and rushing into his immediate presence uncalled for,—the other temporal, against the king, who hath an interest in the preservation of all his subjects; the law has therefore ranked this among the highest crimes, making it a peculiar species of felony—a felony committed on one's-self. A *felo de se*, therefore, is he that deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own death; as if, attempting to kill another, he runs upon his antagonist's sword; or, shooting at another, the gun bursts and kills himself, 1 Hawk. P. C. 68; 1 Hale, P. C. 413. The party must be of years of discretion, and in his senses, else it is no crime."

It should seem, therefore, that the word has never been used by law writers, except in the sense of a criminal taking away of one's own life; at least I am not aware of any instance in any law writer of its use in any other sense.

It may be presumed that the word is of legal introduction, and was perhaps first taken from the law writers by Archdeacon Paley. It has since become a word of general use; but I am not aware of any authority by which it can be shown that it has lost the meaning to express which it was originally framed, or adopted from some other language. And I think it is clear, that although it may possibly sometimes admit, in modern times, of a more loose and vague interpretation, it certainly may mean self-destruction by a person *compos mentis*, and morally responsible for his acts; and the question is, whether that meaning is or is not what was intended by the parties to this contract.

Now, in this policy I find it coupled with the word "commit;" the expression is, "commit suicide." The meaning of "commit" in Johnson, with reference to the use of the word, is "to perpetrate—to do a fault—to be guilty of a crime;" and "perpetrate" is, to commit, to act, always in an ill sense. There is no material difference in Richardson.

[\*780] If, therefore, it be admitted, as I think it must, that one meaning of "suicide" imports not merely an act, but a criminal act, the use of the expression "commit suicide" is some, and I own I think a strong reason for believing that the parties to this contract used the word in that sense.

The sentence also in which it is found may throw some light on the matter. It is coupled with death by duelling or by the hands of justice; and the condition is not, if the party shall die by suicide, but if he shall "commit suicide." I think this imports some deliberate criminal act, and not an act the result of insanity, which leaves him intelligence enough to know the means of death, but without any moral control over his actions.

Again, does the nature of the instrument itself supply any argument either way? The object of such a policy is generally to make provision for the family of the insurer; and he would naturally desire to include

all risks. It is admitted that he is protected, not only against the common chances of death by disease, but against accident, or mere negligence of the grossest kind. He may even be the immediate cause of his own death by a deadly weapon provided he be so insane as to be utterly unconscious of what he is doing. But, according to the argument for the defendants below, if he retains a glimmering of reason just enough to enable him to seek to produce death by competent means—it matters not whether he be lost to all moral sense, and for any other act or crime a complete madman,—his policy is forfeited.

I own I cannot, from the nature of the contract, believe that this was what the parties intended. A man anxious to provide for his family would, among the possible calamities of life that might terminate it, anticipate madness as one; and whether it prostrated his intellect altogether, or produced delusion, or destroyed only a part of his faculties, would make no difference. The language used in the agreement between the parties does not necessarily exclude this risk. I think, therefore, as against the office, the risk ought to be included.

Examining the question upon more general principles, I am induced to come to the same conclusion. In the eye of the law, with reference to crime, a man is either *compos mentis* and responsible, or he is *non compos mentis* and irresponsible. \*Physiologically, no doubt, it is otherwise; and the gradations are perhaps imperceptible, from [\*781] the highest perfection of intellect, to the darkest obscurity of the mind. But in point of law, as soon as it is ascertained that a person (to use the language of my brother Cresswell in directing the jury) has lost his sense of right and wrong, it matters not what else of the human faculties or capacities remain; he ceases to be a responsible agent, and, in my judgment, can no more commit suicide than he can commit murder.

Lastly, the views taken by the defendants' counsel appear to me to be opposed to all the principles of sound philosophy which can be applied to the subject.

It is admitted, of course, that the office would be liable if death ensued from any of the ordinary casualties of life, even resulting from the act of the party insured, provided the act were not done with the intention to kill. The act of a raving madman, or of a patient under the influence of disease, is protected by the policy, if the consequences are not foreseen and intended. So, if insanity should produce delusion, and deprive a man of the use of the ordinary senses, and the party should mistake a deadly weapon for an instrument of music, and fancy he was playing upon it, when he was destroying his own life, this would not be committing suicide within the proviso of the policy. But what if the delusion, instead of applying to a pistol, or other instrument of death, applied to the man himself? Suppose he believed he was Marcus Curtius, and ought to leap into a gulf? or that he was one of the Decii, and must sacrifice himself for the benefit of his country? or what if he fancied himself an apostle, and that it became his duty to die the death of a martyr? What sound philosophy is there in taking a distinction between a delusion about a pistol, and a delusion in respect of the man against whom it may be directed? or what distinction, in point of good sense,

can be taken between physical blindness, in consequence of which the party insured walks into a well, and intellectual or moral blindness, which, leaving him the use of his senses, and a knowledge of the physical consequences of his acts, has deprived him of all judgment which should control and govern his acts, and of all sense to perceive their moral consequences?

[\*782] \*It may be said, that when the delusion extends to the character, office, or condition of the party, so that he mistakes his identity, he does not mean to kill himself, and in such a case the office would be liable. But how far is this to be carried? Suppose, under a delusion, he believed he had committed a crime for which he ought to put himself to death, and that this was the result of insanity, is this a mistake of his identity? and how is a judge to direct a jury so as to steer clear of the difficulties that would thus arise? In my opinion, such subtleties as these ought to find no place in the decision of such a question as the present, in which is involved (from the present extensive practice of life-insurance) the peace, the happiness, and security of thousands of families. Some simple, clear, and safe rule ought to be laid down as to a subject in which the public is so deeply interested.

In my judgment, if death be the result of disease, whether by affecting the senses or the reason, the insurance office is liable under this policy. Whether the privation of reason be total or partial,—whether it produce delusion of one kind or another,—whether it affects sensation, apprehension, memory, judgment, or will, or any of the moral and intellectual powers which constitute our nature,—if the act be not the act of a sane responsible creature, but is the result of any delusion or perversion, whether physical, intellectual, or moral, it is not the act of the man: and to hold otherwise seems to me a departure from the simplicity of the law, and to be repugnant to sound philosophy, which is the spirit of all law, and on which all law ought to be founded.

I will only add, that I have not adverted to the case of *Borradaile v. Hunter*, because the expression in that case, “shall die by his own hand,” is so different from the expression in this case “commit suicide” that that decision is no authority on the point arising here.

The opinion of the majority of the learned judges who were present at the argument being in favour of the plaintiffs in error, a *venire de novo* was awarded.

Judgment accordingly.

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[\*783] \*Where a party assured commits a felony for which he is executed, the policy is avoided, although it should contain no condition relative to such an event. On the execution of Fontleroy for forgery, a claim was made on a policy effected on his life. The master of the rolls sustained the claim, *Bolland v. Disney*, 3 Russ. 351. The judgment, however, was reversed in the house of lords. Lord LYNDHURST, C., observed,—“Suppose that in the policy itself this risk had been insured against, is it possible that such a contract could have been sustained? Is it not void upon the plainest principles of policy? Would not such a contract, if available, take away one of those restraints operat-

ing on the minds of men against the commission of crime, namely, the interest we have in the welfare and prosperity of our connexions? Now, if a policy of that description, with such a form of condition inserted in it in express terms, could not on grounds of public policy be sustained, how is it to be contended that in a policy expressed in such terms as the present, and after the events which have happened, we can sustain such a claim? Can we in considering this policy give to it the effect of that condition which, if expressed in terms, would have rendered the policy, as far as that condition went at least, altogether void? Upon this short and plain ground, therefore, I think that the policy cannot be sustained, and that the respondents are not entitled to recover." *Amicable Society v. Bolland*, 4 Bligh, N. S. 194, 2 Dow and Cla. 1.

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IN MARINE ASSURANCE THE RIGHT TO CLAIM FOR A TOTAL LOSS IS, DETERMINED NOT BY THE REAL OR SUPPOSED STATE OF THE VESSEL AT THE TIME WHEN THE NOTICE OF ABANDONMENT IS GIVEN, BUT BY THE REAL STATE OF THE VESSEL WHEN THE ACTION IS BROUGHT.

# I.—BAINBRIDGE v. NEILSON.

Nov. 22, 1808.—E. 10 East, 328.

THIS was an action upon a policy of assurance upon the ship *Mary*, valued at £6000, at and from Liverpool to any port or ports in Jamaica, during her stay there, and from thence to her port of discharge in Great Britain, &c. ; and also upon \*another policy of insurance upon the freight of the same ship from Jamaica to her port of discharge [\*784] in Great Britain, valued at £4000. At the trial at Guildhall, a verdict was found for the plaintiffs for £139, 5s. 4d., subject to the opinion of this court on the following case:—

The defendant subscribed both the policies for £200 each. The plaintiffs at the time of effecting the insurance, and also at the time of the capture after mentioned, were interested in the ship and freight. The ship sailed in due time from Jamaica with a cargo and freight bound to Liverpool; and on the 21st of September, 1807, was captured on her voyage home by an enemy; and on the 25th was recaptured. On the 30th of September the plaintiffs received intelligence at Liverpool of the capture, but not of the recapture; and on the day following communicated the same to the underwriters, and gave notice of abandonment. On the 2d of October the intelligence of the capture was confirmed; and on the 6th. of October, being five days after the notice of abandonment, the plaintiffs received the first intelligence of the recapture of the vessel, and that she then lay at Lock Swilley in Ireland, in safety, in the possession of the recaptors. This intelligence was immediately communicated to the underwriters, with notice that the plaintiffs nevertheless persevered in their abandonment, but offered to do their best for the benefit of those who should be ultimately concerned and interested in the vessel, without prejudice. Under such offer, and by agreement with the underwriters, without prejudice to either party, the

plaintiffs compromised with the recaptors; and the vessel has been restored, and has arrived at Liverpool, being her port of discharge, according to the terms of the policy, where she is now in safety. And the owners have also, without prejudice, received the freight of the goods on board her, and the proportion of salvage and expenses on such goods. The plaintiffs obtained possession of the vessel at Lock Swilley under the said agreement after notice of abandonment, but before the action was brought; and the vessel did not arrive at Liverpool until after the commencement of the action. The ship was never taken into an [\*785] enemy's port, nor did she sustain any \*damage whilst in possession of the enemy. The amount of the salvage damages and charges upon the ship is £15, 4s. 8d., and upon the freight £13, 11s. 5d. per cent. on the sum insured. The defendant paid to the plaintiffs before the commencement of this action £57, 12s. 2d., being the amount of his proportion of an average loss upon the two policies; which sum the plaintiffs accepted, without prejudice to their claim to recover a total loss under their abandonment. The question for the opinion of the court was, whether the plaintiffs were entitled to recover for a total loss? If they were, then the verdict was to stand; if not, the verdict was to be entered for the defendant.

*Scarlett*, for the plaintiffs, contended that they had a right to abandon at the time when they gave notice of abandonment, and to abide by such notice, notwithstanding the subsequent recapture and safety of the vessel. What passed after the notice of the recapture cannot make any difference; but the question must be considered the same as if brought to issue immediately after the 6th of October, and while the ship was in the possession of the recaptors. This is different from all the former cases of capture, and recapture, and abandonment, because the abandonment was made while both parties were under a conviction that the vessel was totally lost to the assured by the capture; though before action brought she was known to have been recaptured and in safety. In *Goss v. Withers*, 2 Burr. 683, the ship, which was bound from Newfoundland to Portugal or Spain, was captured, and after remaining eight days in the hands of the enemy, was recaptured, and brought into Milford Haven; on which the assured gave immediate notice of abandonment; and the court decided that, as between the assured and the insurers of the ship, the capture was a total loss, upon which the assured might abandon. Lord Mansfield, indeed, also relied on the subsequent circumstances; but considered the recapture in the nature only of a salvage; the ship having been carried out of the course of her voyage; and the disability to pursue the voyage still continuing at the time the abandonment was made. So here, after the recapture, the ship was carried into Lock Swilley in Ireland, which [\*786] was out of the course of her voyage; and when the plaintiff received advice of it, the ship was out of his possession; and how soon she could be put into her former course could not be known; nor could the plaintiff tell whether it were for his interest to prosecute the voyage or not, when he determined to abide by his original notice of abandonment. The only other case which bears on the question is *Hamilton v. Méndez*, 2 Burr. 1198. The insurance



was on a valued policy on ship from Virginia to London; and the ship was captured in the course of her voyage on the 6th of May, and was recaptured on the 23d in her way into a French port, and brought into Plymouth on the 6th of June. As soon as the plaintiff, who lived at Hull, was informed of these events, he wrote to his agent in London on the 23d of June, to give notice of abandonment to the underwriters; which notice was communicated on the 26th, when the underwriters refused to take to the ship, but offered to pay the salvage and other charges of the recapture. The ship was afterwards, on the 23d of August, brought by the owners of the cargo and the recaptors to London, where she delivered her cargo to the freighters, who paid the freight, without prejudice. And the jury found that she received no damage from the capture; and the whole amount of the salvage was only £10 per cent. That was ultimately held to be an average, and not a total loss. It is observable, however, that there was an interval of seventeen days between the arrival of the ship at Plymouth on the 6th, and the notice of abandonment sent by the plaintiff on the 23d of June; and it cannot be supposed that intelligence of the event was travelling all that time from Plymouth to Hull; and if before such notice the plaintiff had ascertained that no material loss had been sustained, but that the ship might proceed on her voyage to her destined port at salvage of only £10 per cent., it was too late for him to give notice of abandonment as for a total loss. Lord Mansfield, it must be admitted, in giving the judgment of the court, lays down some general positions which seem to trench upon the plaintiff's claim in this case; but he could not have meant them to apply to a case like the present; for towards the conclusion of the judgment he excepts this very case; saying, "We give no opinion how it would be in case the ship \*or goods be restored in safety between the offer to abandon and the action [\*787] brought," &c. He had just before said, "To obviate too large an inference being drawn from this determination, I desire it may be understood that the point here determined is, that the plaintiff upon a policy can only recover an indemnity, according to the nature of this case at the time of the action brought, or, at most, at the time of his offer to abandon." If the latter be adopted as the rule, then as the offer was made upon the first intelligence of the capture, and while both parties continued in ignorance of the recapture, the plaintiff's right to abandon cannot be disputed. [Lord ELLENBOROUGH, C. J.—When Lord Mansfield in the same sentence says, that "the plaintiff upon a policy can only recover an indemnity according to the nature of his case," is that to be understood of the supposed nature of his case, or of the real nature of it?] It must mean the nature of the case as it *bona fide* appears to the parties at the time. The plaintiff's claim is grounded on two propositions; 1st, That the offer to abandon having been rightly made at the time, a right of action became vested in the assured, which could not be defeated by subsequent events. 2dly, That when the ship was recaptured and carried into Lock Swilley, it was still the subject of abandonment. As to the first, it cannot be denied; because, after intelligence of the capture received, and the offer made

to abandon, the plaintiff might instantly have brought an action against the underwriters to recover a total loss; and their refusal to pay cannot now vary his claim as it then stood. And if a case for abandonment exist at the time, and the party do abandon, no subsequent event can do away the effect of it, but the question is concluded. This is in every day's experience. [Lord ELLENBOROUGH, C. J.—The question is, whether the right to abandon did exist at the time it was made; the supposed right of abandonment existed; but it remains to be shown that the supposed is the same as the real right to abandon.] If the parties act *bona fide* on the notice they have of the fact, that is sufficient for the purpose of insurance. In the case of a distant voyage, and intelligence received of a capture, if the assured could not abandon immediately, but must wait for final intelligence of the ship being carried into [\*788] the enemy's port, \*much inconvenience may ensue, for want of such active endeavours to recapture and make the best of the loss as would otherwise be made. Suppose, after notice of a loss and an offer to abandon, which the underwriters agree to accept, it afterwards turns out that there has been no loss; as in some of the late cases of the Russian embargo; yet the parties are bound. [Lord ELLENBOROUGH, C. J.—There both parties agree to act upon the supposed case, whatever the event may turn out to be.] 3dly. The ship was still the subject of abandonment when recaptured and carried into Lock Swilley in Ireland. In these cases the knowledge of the assured as to the true state and condition of the ship is a material circumstance. In *Hamilton v. Mendez* it must be taken from the length of time intervening, being seventeen days between the arrival of the ship at Plymouth and the sending notice of abandonment from Hull, that the assured had full knowledge of everything. But here the plaintiff could not have had time to acquire information whether or not it were his interest to abandon, as he renewed his notice immediately upon receiving intelligence of the ship's arrival at Lock Swilley. Suppose, after a recapture, the ship is taken into a distant port out of the course of her voyage; if the assured be to wait for full intelligence of all the facts before he gives notice to abandon, the underwriters may object that the notice comes too late, when the event would be probably known. It is sufficient, however, if in fact the assured, at the time of the notice given, be ignorant of the circumstances from whence he can tell whether or not it is his interest to abandon. From the mere knowledge of the fact of the ship being in safety in the possession of the recaptors, at Lock Swilley in Ireland, which was out of the course of her voyage, he could not tell what damage she had received, how many of her crew remained, or how soon she might be able to prosecute her voyage to its termination. The case of *Goss v. Withers* bears strongly in point. There the owner had heard that his ship was recaptured and carried into Milford Haven, but in what state and condition he could not tell, and therefore he made his election to abandon; which it was held that he had a right to do. [Lord ELLENBOROUGH, C. J.—Do you contend that the intelligence of the recapture, and that the [\*789] ship was in \*safety in a port in Ireland, gave the plaintiff a new right to abandon?] That is not necessary in this case, where there

was previous notice to abandon given immediately after intelligence of the capture. But, taking the whole sum of the intelligence together, it amounts to notice of a capture and recapture, and that the ship was then in the possession of the recaptors, in the port of another country, out of the course of her voyage, and with the prospect of continuing in ignorance of the actual state of things for three weeks, and with a probability of the ship continuing there for some time longer.

*Holroyd, contra.*—All the circumstances of the case are material to be considered; and the plaintiff cannot convert that which, in its nature and in fact, is only a partial, into a total loss, by offering to abandon. The action is brought upon two policies, both valued; one on the ship, the other on the freight; upon the latter it is admitted that there has been no loss at all by the capture; and the loss in fact upon the ship is only £15, 4s. 8d. per cent. Where the assured and the underwriters do not agree upon the abandonment, the right of either party can only depend upon the actual state of things at the time when the notice is given; and when the notice was given the loss had ceased to be total, and was in fact only a partial loss, though this was not known till afterwards. Nor does it follow that because intelligence was received of a capture, an action would have lain immediately against the underwriters upon notice to abandon; for it would be incumbent on the assured to make out the fact of a total loss, which could not be known with certainty till a reasonable time had elapsed to learn the final issue; and the material fact to be proved is that there was a total loss at the time of the offer to abandon. The intelligence might have come away immediately after the ship struck to the enemy, and when other vessels were in sight, so as to render the final issue very uncertain. And even after an actual capture and possession by the enemy there is the chance of a recapture within a reasonable time, of which the underwriter is entitled to avail himself any time at least before the action brought. If it were otherwise, a door would be opened to fraud, in the case of valued policies, which are generally \*valued highly, and hold out a strong [\*790] temptation to the assured not to make those exertions to avoid or redeem a total loss which would, under other circumstances, be made. In *Hamilton v. Mendez*, 2 Burr. 1209, Lord Mansfield enumerates the circumstances which continue the loss total notwithstanding a recapture: "If the voyage be absolutely lost, or not worth pursuing, if the salvage be very high, if further expense be necessary, if the insurer will not engage in all events to bear that expense, though it should exceed the value, or fail of success," &c. He also refers to the instances in *Le Guidon* of a total loss where the assured may abandon: "if the damage exceed half the value of the thing, or if the voyage be lost, or so disturbed that the pursuit of it is not worth the freight." Now none of those circumstances exist in the present case; the voyage was not lost, though the ship was carried by the recaptors into a port a little out of her course, where she was known to be in safety; and in fact she did afterwards perform her voyage, and earned all her freight, and the salvage is very low. Lord Mansfield further says, that "the action must be founded on the nature of the plaintiff's damnification, as it really is

at the time of the action brought;" for that "it is repugnant, upon a contract of indemnity, to recover as for a total loss, when the final event has decided that the damnification in truth is an average, or perhaps no loss at all." The plaintiff might not know that the loss was only partial when he offered to abandon; but the master on board knew the fact; and where the master is a part owner, as it frequently happens, a different rule must be laid down; for the ignorance of his partner, or of his agent on shore, who procures the assurance to be made, certainly cannot entitle him to abandon upon a supposed fact, the contrary of which was known to him at the time the offer to abandon was made, which shows how dangerous and difficult a rule it would be to proceed upon the supposition of any of the parties, and not upon the fact. It may be admitted that if both parties agree to treat the case as a total loss, and the underwriter pay his money, it will bind both; as in *Da Costa v. Firth*, 4 Burr. 1966. And there is a mutual consideration to sustain such an agreement, though it should turn out to have been made [791] upon false intelligence; for the assured \*ceases to labour for the ship, and the underwriter takes that labour upon himself, upon the chance of matters turning out more favourably for him. The case of *Goss v. Withers*, 2 Burr. 683, is very distinguishable from this; for the ship there was so much disabled by a storm previous to her capture as to be incapable of proceeding on her destined voyage without going into port to refit; and part of the cargo having been thrown overboard during the storm, and the rest spoiled while she lay in Milford Haven, and before she could be refitted, the voyage was entirely lost at the time of the offer to abandon. Lord Mansfield says, that the loss continued total as to the destruction of the voyage; and the recovery of anything could only be had upon payment of more than half the value. With respect to the policy on freight, the whole of which had been earned, he referred to *McCarthy v. Abel*, 5 East, 388, as in point to show that nothing could be recovered; the whole freight having been earned, and consequently no loss within the policy. That case was stronger than this, because the offer to abandon was made during the continuance of the Russian embargo, which was afterwards taken off; and being a chartered ship, the freight could not be due to the underwriters to whom the ship was abandoned and assigned, because it grew upon a contract which was personal, and the new ship-owners were not obliged to bring home the cargo. But as the loss was not total at the time of the action brought, and the underwriters had not done anything to fix it on themselves, the plaintiff *McCarthy* could not recover. At any rate, the present plaintiff cannot be entitled beyond the amount of the partial loss paid to him before the action brought.

*Scarlett*, in reply, maintained that the action would have lain against the defendant to recover a total loss at the time of the original abandonment; for on the proof of the first intelligence, it would be taken that the capture continued; and it would lie on the underwriter to prove the recapture, and that the ship was restored to the owner, and was again prosecuting the voyage insured. The case of a captain part owner might make a distinction, but that is not the present case; and here there is

no fraud imputable to the plaintiff. In *McCarthy v. \*Abel*, [792] the court went on the ground that the loss, if any to the plaintiff, (for in fact there was no loss of the thing insured, which was freight,) arose from his own act, and not from any peril insured against. If there had been no abandonment, or if the same underwriters had insured both ship and freight, no question could have arisen. But here there has in fact been a loss, and that by a peril insured against; and the only question is, whether it shall be deemed a total or only a partial loss; there having at one time been a total loss, and the offer to abandon having been made *bona fide* while the plaintiff had reason to believe that the loss continued total.

LORD ELLENBOROUGH, C. J.—This is a case which, though new in species, is by no means new in principle. And though Lord Mansfield said, in *Hamilton v. Mendez*, that he would not give an opinion how the case would be if the ship were restored in safety between the offer to abandon and the action brought, yet there can be no doubt from the whole of his reasoning on that case what his decision would have been under these circumstances. The facts here are that the ship was captured on the 21st of September, and recaptured on the 25th; after which, the plaintiff having received intelligence on the 30th, of the capture, but not of the recapture, gave notice of abandonment on the 31st; which he persevered in after the 6th of October, when news of the recapture arrived, and that the ship was safe in a port of Ireland; but which notice the underwriters did not accept. And now it appears that instead of a total loss, there has been a small partial loss of £13 and a fraction, for salvage and charges on the policy on freight, and £15 and a fraction on the ship policy, and that no damage whatever was sustained by the ship while in the possession of the enemy. And the question is, whether that which in the result turns out to be only a partial loss to a trifling extent shall, because of the notice of abandonment given when a total loss appeared to exist, be now recovered as a total loss? To give effect to such an attempt would grievously enlarge the responsibility of underwriters; it would be to make them answerable, not for the actual loss sustained by the assured, whom they have undertaken to indemnify against the risks \*stated in the policy, but for a supposed total loss, which [793] had in fact ceased to exist. It has been said in argument, that the offer to abandon having been rightly made at the time, a right of action vested in the assured, which could not be defeated by the subsequent events. But that proposition is not only not true in the whole, but it is not true in its parts. The effect of an offer to abandon is truly this, that if the offer appear to have been properly made upon certain supposed facts, which turn out to be true, the assured has put himself in a condition to insist upon his abandonment; but it is not enough that it was properly made, upon facts which were supposed to exist at the time, if it turn out that no such facts existed, or that other circumstances had occurred which did not justify such abandonment. It may be said to be properly made upon notice received, and *bona fide* credited, by an assured, of his ship having been wrecked, whether such intelligence were true or not, and though the letter conveying it turned out to be a

forgery; and yet clearly no right of action would vest in him founded upon an abandonment made upon false intelligence, and without anything in fact to warrant the giving of such notice. What is an abandonment more than this, that the assured having had notice of circumstances, which, if true, entitle him to treat the adventure as a total loss, he in contemplation of those circumstances casts a desperate risk on the underwriter, who is to save himself as well as he can. But does not all this presume the existence of those facts on which the right accrues to him to call upon the underwriter for an indemnity; and if they be all imaginary, or founded in misconception, or if at the time it had ceased to be a total loss, and there be no damage to the assured, or at least if the only damnification arise out of the very act (the recapture) which saves the thing insured from sustaining a total loss, the whole foundation of the abandonment fails. It is then said that if the right of abandonment once vested and be exercised in time, it cannot be divested by subsequent intelligence of other circumstances or different events. But the case of *McCarthy v. Abel* shows the contrary; for there, though the notice of abandonment was well made at the time, it was not only divested by subsequent circumstances, but by circumstances \*which [794] happened after the notice of abandonment had been given. Next it is contended that, by the recaptors taking the ship into a port in Ireland, the right of abandonment was revived, or a new right created; for I do not exactly understand whether this be insisted on as an entire and distinct cause of abandonment, or as connected with the antecedent capture and recapture. Now, if it grew out of the recapture, let us hear what Lord Mansfield said upon that subject in *Hamilton v. Mendez*. It does not, he says, cease to be a total loss because of the recapture, "if the voyage is absolutely lost, or not worth pursuing;" [here the voyage was not lost, and was worth pursuing, and was pursued with effect:] "if the salvage is very high:" [here it is very trifling:] "if further expense is necessary; if the insurer will not engage in all events to bear that expense," &c. But here the further expenses were little or nothing beyond the salvage, and all the loss has been actually paid into the plaintiff's hands. If after the recapture the ship had been carried into a port abroad, and a sale had become inevitable, because nobody would secure to the recaptors their 1-8th, it might have been deemed to be a total loss; but that is not the present case. What was said by Lord Mansfield, however, is sufficient to show that in the case of a capture and recapture, it does not necessarily follow that the assured is entitled to abandon as for a total loss; but it depends upon circumstances; and none of the circumstances enumerated by him exist in the present case. I cannot, however, consider, as at present advised, that the right of abandonment relates only to the actual state of things at the time of the offer to abandon made. If it were necessary to the decision of this case, I should wish to have that point well considered. I am not disposed to enlarge the grounds of abandonment against underwriters,—a privilege which, everybody knows, has been much abused. In almost every case of a valued policy it is the interest of the assured to abandon; and therefore it behoves the court to watch every such case, and in no instance to en-

large that which in the nature of the thing is only a partial, into a total loss. It might as well have been said in *McCarthy v. Abel*, that having been once a total loss, it must continue so; but the court held otherwise; and that case is not distinguishable \*in this respect from the present, except that there eventually was no loss there of the [\*795] subject-matter of the insurance, and here there is only a partial loss; but I can see no difference whether that which for a time was a total loss ceased altogether by subsequent events to be any loss at all, or whether it be reduced by subsequent events to so small a loss as there is in the present case. We must look, as we lately said in *Godsall v. Boldero*, 9 East, 81, to the real nature of the contract in a policy of insurance, which is nothing more than a contract of indemnity; and therefore, though there was a total loss there, as it might be called, with respect to the subject-matter of the risk insured; yet that having afterwards intervened between the supposed damnification of the plaintiffs by the death of Mr. Pitt, and the action brought, which adeemed the loss, it was held that they could not recover. So here, as that which was supposed to be a total loss at the time of the notice of abandonment first given had ceased, and as only a small loss has been incurred in the salvage, that is the real amount of the damnification which the plaintiff is entitled to receive under this contract of indemnity, and that has already been paid by the underwriters.

GROSE, J.—This is a case upon which it is said that Lord Mansfield, in *Hamilton v. Mendez*, professed to give no opinion; but it is very clear what his opinion would have been upon the principles laid down by him in the same case; and if there be no express decision on the point, we must resort to principle in deciding it. And one of the best principles upon this subject is, that no artificial reasoning shall turn that into a total loss, which in fact is only a partial loss. A policy of insurance is only a promise by the underwriter to indemnify the assured against loss by certain risks; and if so, how can the plaintiff claim a total loss, when in fact the vessel insured has performed her voyage, and he has only sustained an actual loss of £15, 4s. 8d. per cent. on the ship, and £13, 11s. 5d. per cent. on the freight insured? The case states that which is very material, that the plaintiff had possession of the ship again after the recapture, and before the action brought; that she sustained no damage from the capture while she continued in the possession \*of the enemy; and that she has been restored and has arrived at her port of discharge; and that the freight has been [\*796] received by the owners. What pretence then is there for saying that this is a total loss, where no damage has been done to the ship, and only a trifling expense incurred for the salvage and charges of the recapture? We must look here to the time of the action brought to see whether there has been a total loss of the subject-matter to the plaintiff, as he alleges; and it is clear that at the time there was not a total but only a small partial loss.

LE BLANC, J.—I agree in opinion that there must be judgment for the defendant upon this case, which though new in circumstances is not so new in principle. The main stress of the plaintiff's argument has

been, that at the time of the notice of abandonment he had a right to abandon. But there is the fallacy of it. It does not follow that he had a right to abandon because he had a right to give notice of abandonment upon the faith of the intelligence first received. At the time of the capture he had a right to give such notice; but at the time when the notice was actually given, the ship had been recaptured, and was carried into Lock Swilley in Ireland, a port of the United Kingdom, in the course of her voyage home; and there is no evidence of any damage sustained either by plunder of or by mischief done to the ship, cargo, or crew, which could make it a total loss. It is impossible then to say that the want of knowledge by the assured of the true state of things shall vary the fact, and make that a total loss which is only a partial loss. None of the decided cases of total loss come up to the present; and not even the cases put by Lord Mansfield in *Hamilton v. Mendez*. The plaintiff knew of some of the circumstances, but did not know them all. The mere circumstances of capture and recapture will not make it a total loss. It may often happen that intelligence is received which will justify the giving notice of an abandonment; but if circumstances so turn out, that there is no total loss, it does not follow that the assured would be entitled to insist on his notice. In *McCarthy v. Abel* the assured was justified in giving notice of abandonment, but circumstances happened afterwards [\*797] which \*showed that there was no loss of the subject-matter. So here, circumstances have turned out to show that only a partial, and not a total loss has been sustained, though the notice of abandonment were properly given at the time upon the intelligence then received. This case falls in very much with an expression used by the chief-justice in delivering the judgment of the Court of Common Pleas in a late case, of *Thellusson v. Shedden*, 2 New. Rep. 230, where he says, "It is true that a capture simply proved establishes a total loss; but when the plaintiff in the same breath proves a recapture, there is an end of the capture and total loss, and the plaintiff is entitled to a partial loss only." So here, though a capture were proved, yet it also appearing that there was a recapture, unless it be also shown that, notwithstanding the recapture, it still continued a total loss, it is only a partial loss.

BAYLEY, J.—The case has been so fully discussed that I can add nothing to make it more clear. A policy of insurance is only a contract of indemnity, and anything which tends to show that an assured can recover beyond his indemnity is against the very principle of the contract; and here it would plainly lead to fraud if the plaintiff, who has in fact only sustained a partial loss to a small extent, could recover beyond what would indemnify that loss. But it is said, that upon receiving intelligence he had a right to abandon immediately. I agree that it was prudent in him to give such notice at the time, and if things had stood in the same situation he would have been entitled to abandon; but I consider that notice as including this implied condition, that things continued to exist as the plaintiff supposed they did exist at the time when he gave the notice; and if anything happened afterwards to make that a partial which at one time was a total loss, the ignorance of that fact by the assured would not make it a total loss. The case of



*McCarthy v. Abel* shows that subsequent facts will vary the right of the party to abandon as for a total loss, when ultimately no loss is incurred within the policy. Suppose a capture, and the captors afterwards give up the ship, and she pursues her voyage as before, and the assured receiving intelligence of the capture, but not of the release, give notice to \*abandon; yet if the voyage be afterwards performed, would that entitle the assured to make it a total loss, when he had sus- [\*798] tained no actual loss at all, though the voyage might have been a little delayed? Yet that would show that circumstances happening after a total loss once existing may take away the right to abandon. Then if the fact be that at the time of the notice to abandon given, it was not a total, but only a partial loss, the giving such notice could not entitle him to abandon as for a total loss. By deciding that in all these cases the right of the party to abandon shall depend upon the actual circumstances of the case, and not upon those which are merely supposed to exist at the time, no injustice will be done, and it will make the policy that which it ought to be, and really is, a contract of indemnity.

Postea to the defendant.

## II.—BROTHERSTON v. BARBER.

Nov. 15, 1816.—E. 5 M. & S. 418.

ASSUMPSIT upon a policy of insurance upon the ship *Fanny*, on a voyage from Rio de Janeiro, or any port or ports in the Brazils to Liverpool, and the plaintiff averred a loss by capture. Plea, non-assumpsit. The defendant paid into court 20 per cent. upon his subscription. At the trial before LE BLANC, J., at the Spring Assizes at Lancaster, 1815, there was a verdict for the plaintiffs for the whole amount of the defendant's subscription, subject to the opinion of the court upon the following case:—

The ship sailed from Maranhham, in the Brazils, without convoy, bound to Liverpool, on the 8th of March, 1814, having part of her cargo on board belonging to the plaintiffs, and the remainder of her cargo belonging to other shippers, subject to freight payable to the plaintiffs. On the 19th of April, the ship was captured by an American privateer off the coast of Ireland. On the same day the privateer fell in with a Portuguese vessel \*bound for Liverpool, on board of which the captain and part of the crew of the *Fanny* were put, and they [\*799] arrived at Hoylake, near Liverpool, on the 23d of April. The captain of the *Fanny* finding it impossible to get to Liverpool that day, informed the plaintiffs by letter of that date of the capture. A copy of this letter was, on the 25th, handed by the plaintiffs to the insurance brokers employed to effect the insurance, together with a letter of notice, that the plaintiffs abandoned the ship, and all their interest in her, which the brokers communicated to the defendant. The *Fanny*, with her cargo on board, was recaptured on the 12th of May following by his

majesty's ship *Sceptre*, of which the plaintiffs received information on the 15th June following, and communicated the same to the defendant. The *Fanny* and her cargo arrived at Gravesend on the 24th of June, and at Liverpool on the 26th of September, following, not having been in any port from the time of the capture, and her cargo was delivered at Liverpool to the consignees. The *latitat* issued on the 10th of November, and the declaration was filed in Michaelmas term, 1814.

The question for the opinion of the court was, whether the plaintiffs were entitled to recover as for a total loss. If the loss was only partial, the verdict was to be reduced to £8, 8s. 4d., the amount of such partial loss beyond the sum paid into court.

*Littledale* contended that the plaintiffs, notwithstanding the re-capture, were entitled to insist on their abandonment, and to recover as for a total loss. And he mainly relied on this, that the abandonment was made at a period when the loss was an actually subsisting total loss, and not merely so in the *bona fide* contemplation of the parties; which, he said, differed the case at bar from *Bainbridge v. Neilson*, 10 East, 329; *Falkner v. Ritchie*, 2 M. and S. 290; *Anderson v. Wallis*, 2 M. and S. 240; *Parsons v. Scott*, 2 Taunt. 363; and almost all the cases in which the risk of the assured after abandonment had been held to be subject to the variation of events. But if this is to be considered as a general rule operating upon every case of abandonment, it may be asked, of what use is abandonment, and how came it into practice? The practice is [\*800] irreconcilable with any other doctrine than that abandonment is conclusive, wherever the assured, at the time of making it, is in a complete condition to insist upon a total loss; in which case he may abandon, and demand his indemnity *instantly*. And suppose the plaintiffs in this case had so done, and the loss had been adjusted, or, upon refusal to adjust this, action had been commenced, before the recapture, would that event have abated the action or opened the adjustment? If not, it follows that the right to demand a total loss, and consequently to cast by abandonment upon the underwriter the remaining risk, whatever that might be, was well vested in the plaintiffs; and if they had such right, it cannot be in the option of the underwriter to choose whether or not he will accept the abandonment. In *Smith v. Robertson*, 2 Dow. 474, upon appeal from the Court of Sessions in Scotland, where judgment had passed for the owners, on the ground that by notice of abandonment the transaction closed, this judgment was affirmed in Dom. Proc. on a different ground indeed, but Lord Eldon appears to have doubted the propriety of the decisions in *Bainbridge v. Neilson*, and *Faulkner v. Ritchie*.

*Richardson*, contra, observed that the judgment in *Smith v. Robertson* was affirmed in Dom. Proc., upon the ground that the underwriter had acquiesced in the abandonment, so that it was out of the principle now contended for by the plaintiffs. And he cited *McCarthy v. Abel*, 5 East, 388, as an authority to show, that, notwithstanding an abandonment of freight made pending the existence of circumstances which amount to a total loss, yet if freight be, in the events which afterwards happen, fully earned, no loss can properly be demandable against the

underwriter. And he insisted upon the reasonableness of such a position, an insurance being purely a contract of indemnity; whence it followed that the assured could never be entitled to recover for a total loss, when the event has decided that the loss is but partial, or perhaps no loss at all. In support of which reasoning he quoted *Hamilton v. Mendez*, 2 Burr. 1198; 1 Black, R. 276; and *Godsall v. Boldero*, 9 East, 72.

Lord ELLENBOROUGH, C. J.—The cases which have been the \*subject of this day's observation have all taken root in the doctrine of Lord Mansfield in *Hamilton v. Mendez*, in which it is laid down, that an assured can only demand an indemnity; and, consequently, his action must be founded upon the nature of his damnification as it really is at the time the action is brought. Now, if we inquire as to the nature of the injury sustained by this capture, followed by the recapture, what was it at the time when this action was brought? It seems to me that the only injury was a retardation of the voyage during the time the ship was in the enemy's custody, and was diverted from her course to Liverpool, the amount of which has been ascertained to be £8, 8s. 4d. *ultra* what has been paid into court. In cases of capture, a *spes recuperandi* exists; it is not as if the ship were sunk to the bottom; there must be always a greater or less degree of probability that she may ultimately be recovered; of which advantage the assured certainly ought not to be ousted. By notice of abandonment the assured made an offer, which remained executory; and in this suspended state of things, considering this as a contract of indemnity, the assured had a right to look to intervening accidents, which might chance to restore them *de integro* to their former situation. The policy does not make any special provision for the case of abandonment; but the law says, that the underwriter shall indemnify; which, if the sum subscribed were nicely calculated to the exact value of the thing insured, would be effected, in the event of a total loss, by paying the entire sum. I cannot consider a notice of abandonment as an executed contract, particularly since the passing of the Registry Acts, which require several things to be done to perfect the transfer, and to make the title complete. An offer on the one side, acceded to on the other, may have the effect of closing the transaction, as in the case determined in the house of lords. But what has been done here to preclude either the assured or underwriter from availing themselves of intervening events? *Bainbridge v. Neilson*, and other cases, have determined that the assured may be remitted to his situation *de integro* by the recapture; and certainly, unless we are to consider this as a wagering contract, instead of a contract for indemnity, the reason of the thing requires that it should be so; for the value \*of the thing abandoned to the underwriter might in some instances infinitely exceed, and in others fall short of, the sum insured. But I do not find it laid down that either the underwriter or the assured is to be a gainer in any way by this contract. Unless, therefore, the principle of indemnity is to be changed for one of hazard and gambling, it seems to me that these plaintiffs must stand, in regard to their claim for indemnity, in the position in which subsequent events have placed

them, at the time when they come to demand it; that is, when the action is brought. The same principle, though not with reference to an abandonment, governed the decision of *Godsall v. Boldero*. The court there considered, that although a total loss had happened, so far as it regarded the risk insured, yet as that loss had been redeemed by subsequent circumstances, the assured had no cause of action upon his contract for indemnity; and there also the court referred to the language of Lord Mansfield in *Hamilton v. Mendez*, who develops the true principle and object of such an assurance. It seems to me, therefore, that this not being an abandonment of such a nature as to preclude the assured from resuming all their rights *de integro* in the ship, the underwriter shall not be made answerable for a total loss.

BAYLEY, J.—I think the plaintiffs are not entitled to recover more than the £8, 8s. 4d. beyond the sum paid into court; that is, the amount of the damnification at the time when the action was brought. This is a contract of indemnity only; the ship was captured in the course of her voyage. Now, capture is an event which may or may not terminate in a total loss; if it continue and terminate in a total loss, the assured will be entitled to his full indemnity; but if the capture be only temporary and the loss partial, it would be against the spirit as well as letter of the contract to hold the underwriter bound to take to the subject-matter insured, and to allow the assured, who stipulates only for indemnity, to come upon the underwriter for the whole amount of his subscription, while the subject-matter insured subsists in perfect safety. What is it that is thus to entitle the assured to demand more than the safety of the thing insured? It is said that abandonment gives this \*right, [\*803] by closing the transaction between the underwriter and assured. But notice of abandonment is no more than a proposal on the part of the assured; which the underwriter may accept, and then there will be a new agreement between them binding on both parties. But while the transaction rests in abandonment only on one side, the underwriter's responsibility may vary, and cannot amount to a total loss, if, by subsequent events, it has become otherwise at the time of action brought. It is unnecessary to give any opinion as to how the case might be, if the loss, continuing total at the time when the action is brought, became a partial loss only at the time of trial. It is enough here that the thing remained in safety to the assured at the time when this action was brought, and the loss was only temporary. Consequently the verdict for the plaintiffs must be entered for the limited sum only.

ABBOTT, J.—I am of the same opinion, and think the verdict ought to be entered only for a partial loss. It appears by the case that the ship was captured; that the plaintiffs, having information of it, gave notice of abandonment, which I consider as tantamount to an offer on their part. The ship was afterwards recaptured and brought into port, and then this action is commenced; and the plaintiffs, notwithstanding the recapture and safe return of the ship after performing her voyage, seek to recover as for a total loss. It is not, I think, argued that the capture only, without abandonment, would have entitled the plaintiffs to recover a total loss; the claim is founded on the notice of abandonment.

But the great principle of the law of insurance is, that it is a contract for indemnity. The underwriter does not stipulate, under any circumstances, to become the purchaser of the subject-matter insured; it is not supposed to be in his contemplation: he is to indemnify only. This being the principle, it seems to me that any practice or doctrine which is calculated to break in upon it ought to be narrowly watched. The doctrine of abandonment is of this nature. It has not been stated, that there is any decision in the courts of this country giving effect to an abandonment like the present, so as to entitle the assured to a total loss, though the thing insured is restored and in safety. I have not [\*804] \*discovered any such decision; and upon referring to Emerigon, who collects almost all that is to be found upon the subject in the foreign writers, I observe there is a great contrariety of opinion as to the cases in which abandonment is to be deemed absolute. He puts the case of abandonment, where the ship is afterwards repaired and brought home at the expense of the underwriter, in which case he says the underwriter cannot throw her back upon the assured; but he adds, that Valin is of a different opinion, and that the practice of Italy is otherwise; for there it is sufficient if the underwriter make good the damnification. It is not necessary to carry the doctrine to this length; but as we are not bound by any decision in our own courts, nor do foreign courts appear to afford any, I feel myself at liberty to decide, on general principles applicable to a contract of this nature, that the plaintiffs are not entitled to recover for a total loss. I am aware of the difficulty that has been suggested if the ship should be restored after the action is brought; as to which it will be better at present to forbear giving any opinion.

HOLROYD, J.—I am also of opinion that the plaintiffs are entitled to recover only for a partial loss. It is clear that a policy of insurance, both in its object and form, is merely a contract of indemnity. It contains no stipulation respecting abandonment; though there is a clause authorizing the assured, in case of any loss or misfortune, to sue, labour and travel for the recovery of the ship, and that the assurers will contribute to the charges. Abandonment has its origin from the contract's being a contract of indemnity. But it is apparent that if the assured might abandon at his pleasure, he might be a gainer to a much greater extent than the value of the loss, which is inconsistent with a contract of indemnity. What, then, is the loss which the assured in this case have sustained? It is a loss arising out of the capture of the ship; and if the ship had been conveyed *infra præsidia* of the enemy and condemned, this loss would have been total; but as events have made it at the time when the action was brought, it is but a partial loss. I am not aware that, in any case, a plaintiff can recover larger damages than what he has sustained at the \*time of bringing the action. Upon these grounds, [\*805] therefore, it seems to me, that the verdict for a total loss cannot be supported.

Verdict to be entered for the lesser sum.

1. In the case of *Hamilton v. Mendez*, 2 Burr. 1198, the ship insured had been taken by a French privateer on the 6th of May, 1760, and on the 23rd day of May she was recaptured by an English man-of-war, and sent to Plymouth, where she arrived on the 6th of June following. The plaintiff lived at Hull, and as soon as he was informed of what had befallen his ship, he wrote to his agent on the 23rd of June, directing him to acquaint the defendant that he abandoned to him his interest in the ship. On the 26th of June, the agent acquainted the defendant with the offer to abandon, when he stated that he did not think himself bound to take the ship, but was ready to pay the salvage, and all other losses and charges which the plaintiff had sustained by the capture. The ship sustained no damage from the capture, and was brought into the port of London upon the 19th of August, by the owners of the cargo and the recapturers, where the cargo was delivered to the freighters, who paid the freight. The question submitted for the opinion of the court was, "Whether the plaintiff, on the said 26th day of June, had a right to abandon, and has a right to recover as for a total loss?" Lord MANSFIELD observed,—“The plaintiff's demand is for an indemnity. His action, then, must be founded upon the nature of his damnification, as it really is, at the time the action is brought. It is repugnant, upon a contract of indemnity, to recover as for a total loss, when the final event has decided, that the damnification, in truth, is an average, or perhaps no loss at all. Whatever undoes the damnification, in whole or in part, must operate upon the indemnity in the same degree. It is a contradiction in terms, to bring an action for indemnity, when, upon the whole event, no damage has been sustained. This reasoning is so much founded in sense and the nature of the thing, that the common law of England adopts it, (though inclined to strictness.) The tenant is obliged to indemnify his landlord from waste; but if the tenant do, or suffer waste to be done in houses, yet, if he repair before any action brought, there [\*806] \*lies no action of waste against him; but he cannot plead *non fecit vastum*, but the special matter. The special matter shows, that the injury being repaired before the action brought, the plaintiff had no cause of action; and whatever takes away the cause takes away the action. Suppose a surety sued to judgment, and afterwards, before an action brought, the principal pays the debt and costs, and procures satisfaction to be acknowledged upon record, the surety can have no action for indemnity, because he is indemnified before any action brought. If the demand, or cause of action, does not subsist at the time the action is brought, the having existed at any former time can be of no avail. But, in the present case, the notion of a 'vested right in the plaintiff to sue as for a total loss before the recapture,' is fictitious only, and not founded in truth. For the insured is not obliged to abandon in any case; he has an election. No right can vest as for a total loss till he has made that election. He cannot elect before advice is received of the loss, and if that advice shows the peril to be over, and the thing in safety, he cannot elect at all, because he has no right to abandon, when the thing is safe. Writers upon the marine law are apt to embarrass general principles with the positive regulations of their own country; but they seem all to agree, 'that if the thing is recovered before the money paid, the insured can only be entitled according to the final event.' Roccus, who collects the opinions of all the authors before his time, and draws conclusions or maxims (solutions of questions) from them, which he calls *Notabilia*, in the place cited at the bar, (fo. 204, not. 50,) puts this question—'Assecurator, qui jam solvit æstimationem mercium deperditarum si postea dictæ merces appareant, et recuperatæ sint, an possit cogere dominum ad accipiendas illas, et ad reddendam sibi æstimationem, quam dedit?' The answer is,—'Distingue. Aut merces, vel aliqua pars ipsarum appareant, et restitui possint, ante solutionem æstimationis; et tunc tenetur dominus mercium illas recipere, et pro illâ parte mercium apparentium liberabitur assecurator: nam qui tenetur ad certam quantitatem respectu certæ speciei, dando illam, liberatur, ut ibi probatur. Et etiam, (another reason, perhaps a better,) quia contractus assecurationis est conditionalis; scilicet, si merces deperdantur; non autem dicuntur deperditæ, si postea reperiantur. Verum si merces non appareant in illa pristina bonitate, aliter fit æstimatio; non in totum, sed prout hinc valent. Aut vero post solutam æstimationem ab assecuratore, compareant

merces; et hinc est electione mercium assecurati, vel recipere merces, vel retinere pretium.' In the case of *Spencer v. Franco*, though upon a wager policy, the loss was held not to be total, after the return of the ship *Prince Frederick* in safety; though she had been seized and long kept by the King of Spain \*in a time of actual war. In the case of *Poole v. Fitzgerald*, though [\*807] upon a wager policy, the majority of the judges and the house of lords held there was no total loss, the ship having been restored before the end of the four months. The present attempt is the first that ever was made to charge the insurer as for a total loss, upon an interest policy, after the thing was recovered. And it is said, the judgment in the case of *Goss v. Withers* gave rise to it. It is admitted that case was no way similar. Before that action was brought, the whole ship and cargo were literally lost; at the time of the offer to abandon, a fourth of the cargo had been thrown overboard; the voyage was entirely lost; the remainder of the cargo was fish, perishing, and of no value at Milford Haven, where the ship was brought in; the ship so shattered as to want great and expensive repairs; the salvage was one half, and the insurer did not engage to be at any expense; it did not appear that it was worth while to try to save anything; and the recaptor (though entitled to one half, as well as the owner of the ship and cargo) left the whole to perish, rather than be at any further trouble or expense. But it is said, 'though the case was entirely different, some part of the reasoning warranted the proposition now inferred by the plaintiff from it.' The great principle relied upon was, 'That as between the insurer and insured, the contract being an indemnity, the truth of the fact ought to be regarded; and therefore there might be a total loss by a capture, which could not operate a change of property; and a recapture should not relate by fiction (like the Roman *jus postliminii*) as if the capture had never happened, unless the loss was in truth recovered.' This reasoning proved, *et converso*, that if the thing in truth was safe, no artificial reasoning shall be allowed to set up a total loss. The words quoted at the bar were certainly used, 'That there is no book, ancient or modern, which does not say, "That in case of the ship being taken, the insured may demand as for a total loss, and abandon."' But the proposition was applied to the subject-matter; and is certainly true, provided the capture, or the total loss occasioned thereby, continue to the time of abandoning and bringing the action. The case then before the court did not make it necessary to specify all the restrictions. But I will read to you, *verbatim*, from my notes of the judgment then delivered, what was said, to prevent any inference being drawn, beyond the case then determined. I said—'In questions upon policies, the nature of the contract, as an indemnity and nothing else, is always liberally considered. There may be circumstances under which a capture would be but a small temporary hindrance to the voyage, perhaps none at all; as if a ship was taken, and in a few days escaped entirely, and pursued her voyage. There are circumstances under which it would be deemed an \*average loss; as if a ship should be taken, and afterwards ransomed.' And in another [\*808] part, I said,—'I know in later times, the privilege of abandoning has been restrained. But there is no danger in the present case; the loss was total at the time it happened; it continued total, as to the destruction of the voyage; a moiety must be paid for salvage, besides other great costs and expenses; what could be saved of the goods might not be worth the freight, for so much of the voyage as they had gone when they were taken; the cargo, from its perishable nature, must have been sold or thrown away where it was brought in; the ship, in so shattered a condition as might make it only worth the materials, to be sold.' And more to the same effect. From this way of reasoning, it did by no means follow, that if the ship and cargo had, by the recapture, been brought safe to the port of delivery, without having sustained any damage at all, that the insured might abandon. But, without dwelling longer upon principles or authorities, the consequences of the present question are decisive. It is impossible that any man should desire to abandon in a case circumstanced like the present, but for one of two reasons, viz., either because he has overvalued, or because the market has fallen below the original price. The only reasons which can make it the interest of the party to desire, are conclusive against allowing it. It is unjust to turn the fall of the market upon the insurer, who has no concern in it, and

who could never gain by the rise. And an over-valuation is contrary to the general policy of the marine law; contrary to the spirit of the Act of 19 Geo. II.; a temptation to fraud, and a source of great abuse; therefore no man should be allowed to avail himself of having overvalued. If the valuation be true, the plaintiff is indemnified by being paid the charge he has been put to by the capture. If he has overvalued, he will be a gainer if he is permitted to abandon; and he can only desire it because he has overvalued. This was avowed upon the first argument, and that very reason is conclusive against its being allowed. The insurer, by the marine law, ought never to pay less upon a contract of indemnity, than the value of the loss, and the insured ought never to gain more. Therefore if there was occasion to resort to that argument, the consequence of the determination would alone be sufficient upon the present occasion. But, upon principles, this action could not be maintained as for a total loss, if the question was to be judged by the strictest rules of common law; much less can it be supported for a total loss, as the question ought to be decided by the large principles of the marine law, according to the substantial intent of the contract, and the real truth of the fact. The daily negotiations and property of merchants ought not to depend upon subtleties and niceties, but upon rules easily learned [809] and easily retained, because \*they are the dictates of common sense, drawn from the truth of the case. If the question is to depend upon the fact, every man can judge of the nature of the loss, before the money is paid; but if it is to depend upon speculative refinements, from the law of nations, or the Roman *jus postliminii* concerning the change or revesting of property; no wonder merchants are in the dark, when doctors have differed upon the subject from the beginning, and are not yet agreed. To obviate too large an inference being drawn from this determination, I desire it may be understood that the point here determined is, 'That the plaintiff, upon a policy, can only recover an indemnity according to the nature of his case at the time of the action brought, or (at most) at the time of his offer to abandon.' We give no opinion how it would be in case the ship or goods be restored in safety, between the offer to abandon and the action brought; or between the commencement of the action and the verdict. And particularly, I desire that no inference may be drawn, 'that in case the ship or goods should be restored after the money paid as for a total loss, the insurer could compel the insured to refund the money, and take the ship or goods,' that case is totally different from the present, and depends throughout upon different reasons and principles. Here the event had fixed the loss to be an average only, before the action brought, before the offer to abandon, and before the plaintiff had notice of any accident, consequently before he could make an election. Therefore, under these circumstances, we are of opinion 'that he cannot recover for a total, but for an average loss only,' the quantity of which is estimated and ascertained by the jury."

2. In *Patterson v. Ritchie*, 4 M. and S. 396, the vessel containing the goods insured was captured, and notice of abandonment was thereupon given. Before the action was brought the goods were recaptured, and arrived at their place of destination, by which a partial loss only was sustained. The plaintiff was held not entitled to recover as for a total loss, on the ground that a party assured can only recover an indemnity for such loss as he has sustained at the time when the action is brought. Lord ELLENBOROUGH, C. J., observed,—"Bainbridge v. Neilson, was, I believe, determined upon the authority of *Godsall v. Boldero*, which underwent much consideration, and was founded upon the doctrine of Lord Mansfield, in *Hamilton v. Mendez*; and although Lord Eldon is said to have spoken with dissatisfaction of *Bainbridge v. Neilson* in the house of lords, I confess, with all deference, I am unable to see any good reason for receding from that judgment. The principle of that and the other decisions is a general one, and is this; I have a right of action for non-payment of money, the party pays me before action brought, that takes away my right of action." BAYLEY, J., observed,—"Lord Mansfield, in *Hamilton v. Mendez*, expressed his [810] opinion that it would be repugnant upon an indemnity to recover for a total loss, when at the time of action brought it turns out that the loss is only partial; and so it appears to me in this case the plaintiff can only recover in respect of that which constituted a loss at the commencement of the action.



3. In *Naylor v. Taylor*, 9 B. and C. 724, Lord TENTERDEN, C. J., observed,—“Doubts were expressed as to the propriety of the decision in *Bainbridge v. Neilson* by a very high authority, in the case of *Smith v. Robertson*, 2 Dow. 474; but notwithstanding these doubts the rule as laid down in *Bainbridge v. Neilson* was adopted and acted upon by the court in the two subsequent cases of *Patterson v. Ritchie*, 4 M. and S. 393; and *Brotherston v. Barber*, 5 M. and S. 418.

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WHEN A SHIP IS TAKEN AND RECAPTURED, AND ON THE RECAPTURE, THE CAPTAIN ACTING FAIRLY FOR THE BENEFIT OF HIS EMPLOYERS, SELLS THE SHIP AND CARGO, AND THEREBY PUTS AN END TO THE VOYAGE, THE INSURED IS ENTITLED TO RECOVER AS FOR A TOTAL LOSS.

### MILLES v. FLETCHER.

June 23, 1779.—E. 1 Douglas, 231.

THIS was an action on a policy of insurance, on the ship, the *Hope*, and her freight, from Montserrat to London. The plaintiff went for a total loss. The defendant insisted that he was only entitled to recover for an average loss. The jury found a verdict for a total loss, and, upon a motion for a new trial, the facts of the case appeared to be as follows:—

The ship, when proceeding on her voyage, was captured on the 23d of May, by two American privateers, who took the captain, and all the crew, and part of the cargo (which consisted of sugars) out of her. The rigging was also taken away. She was afterwards retaken, and carried into New York, where the captain arrived on the 23d of June, and taking possession of her, found that part of what had been left of the cargo was washed overboard, that 57 hogsheads of what remained was damaged, and that the ship was leaky, and in such a state that \*she could [\*811] not be repaired without unloading her entirely. The owners had no store-houses at New York, where the sugars could have been put while the ship was repairing, nor any agent there to advise or direct the captain. No sailors were to be had. The only method he had of paying the salvage, which amounted to the value of 40 hogsheads of sugar, was by sale of part of the cargo, or the ship. The captain did not know of the insurance. If he had repaired the ship, his expenses would have exceeded the freight by more than £100. There was an embargo on all vessels at New York till the 27th of December, and, by the destination of his ship, she was to have arrived at London in July. Under these circumstances, he consulted with his friends at New York, and resolved upon their opinion, and his own, to sell the ship and cargo, as the most prudent step for the interest of his employers. The cargo was accordingly sold and paid for. The ship was also contracted for, but the person who had agreed to buy her ran away, and the captain left her in a creek near New York, and returned to England, where he arrived in the February following, and gave the plaintiff notice of what had been done,

which was the first information he received of it, and the plaintiff immediately claimed as for a total loss from the underwriters, and offered to abandon.

Lord MANSFIELD told the jury, that if they were satisfied the captain had done what was best for the benefit of all concerned, they must find as for a total loss.

The *Solicitor-General* showed cause, and was to have been followed by Dunning, and Davenport, but Lord Mansfield stopped them. Lee, and Baldwin, for the plaintiff.

Lord MANSFIELD.—The great object in every branch of the law, but especially in mercantile law, is certainty, and that the grounds of decision should be precisely known. I took great pains in delivering the opinion of the court in the cases of *Goss v. Withers*, and *Hamilton v. Mendez*. I read both those cases over last night, and I think that from them the whole law between insurers and insured as to [\*812] the consequences of capture \*and recapture may be collected. Whenever a question of law arises at *Nisi Prius*, I propose a case, or grant one when asked for by the counsel, and I avoid as much as possible blending fact and law together, having seen the inconvenience of it in *Poole v. Fitzgerald*. But, on the trial of this cause, it did not appear to me that there was any question of law, and no case was asked for. It was impossible to ask for one till the facts were ascertained, and when they were it would have been impossible to state them in any way which could have left a doubt on the law. It was not contended, that a capture necessarily amounts to a total loss as between insurer and insured; nor, on the other hand, that on a capture and recapture there may not be a total loss, though there remain some material tangible part of the ship and cargo. Neither was it contended that the captain has an arbitrary power by his act to make the loss either partial or total, as he pleases. A great deal has been said about what the admiralty could or would have done in such a case, in order to pay the salvage. As to that, if no owner appeared they would condemn the whole; but if they saw from the ship's papers that there was one, they would not. If there were different claimants of the ship and cargo, they would leave it to them to say what part should be sold, and, if they differed in opinion, would order the sale of such part as would be attended with the smallest loss. But all that is foreign to the present question, which is singly this, whether the consequences of the capture were such as, notwithstanding the recapture, occasioned a total obstruction of the voyage, or only a partial stoppage, as in the case of *Hamilton v. Mendez*. In that case, and in *Goss v. Withers*, great stress was laid on the situation of the ship and cargo, at the time when the insured had notice, at the time of the offer to abandon, and at the time of the action brought. No cases say, that the bare existence of the hulk of the ship prevents the loss being total. In *Hamilton v. Mendez* it is laid down, that "if the voyage is lost, or not worth pursuing, if the salvage is high, if further expense is necessary, if the insurer will not at all events undertake to pay that expense, &c., the insured may abandon, notwithstanding a recapture." Here, at the time of the capture, there were no hopes of a

recovery,—no friend's ship in sight,—no means \*of resistance ; [813] all the crew was taken out, and part of the cargo ; and the rigging also taken away. Afterwards the ship was retaken, and brought into New York. When she was brought there, it still continued a total loss. Neither the insured nor the insurers had any agent in the place. The Court of Admiralty must have proceeded *secundum æquum et bonum*, and might have sold her for the benefit of those concerned. When the insured first had notice, and offered to abandon, (which was when the captain came to England,) and when the action was brought, it was still a total loss. The voyage was abandoned, the cargo sold, and the ship left to be sold. The only answer the defendant makes, or can make to this is, that the loss was total indeed, but that the captain made it so by his improper conduct, for that on his taking possession of the ship the loss became partial, and that he ought to have pursued the voyage. But is this defence true in fact ? The captain, when he came to New York, had no express order, but he had an implied authority from both sides to do what was right and fit to be done, as none of them had agents in the place ; and whatever it was right for him to have done, if it had been his own ship and cargo, the underwriter must answer for the consequences of, because this is within his contract of indemnity. Suppose there had been no insurance, what ought the captain to have done ? 1. As to the cargo ; according to the course of the voyage, the ship should have arrived at London in July. On the capture, part had been taken out, some was washed overboard, 57 hogsheads damaged, and the whole, from the leakiness of the vessel, in a perishable state. There were no store-houses, nor could the ship proceed in the state she was in. The crew was gone, and an embargo laid on till December. What, shall a cargo which was intended to arrive at London in July, be kept in a perishable state at New York, in a leaky vessel, till December ? 2. As to the ship ; it was certainly better to sell her than bring her to London. There was no crew belonging to her, and she had no cargo. Even if all the cargo had been left, the expense of repairs would have exceeding the freight. If she had been brought home the expense of bringing her might have been more than what she would have sold for in London. It has been said, that the damage would not \*have fallen on the underwriters ; but the argument drawn from thence is a fallacy, [814] for that circumstance goes to determine it to be the interest of the insured to abandon the voyage. The point is, what did the owner suffer by the capture, and it appears that he suffered so much that it was not worth while to pursue the voyage. The whole voyage was lost. As the captain did not know of the insurance, he had no temptation to give the turn of the scale to one side or the other. I left it to the jury to determine, whether what the captain had done, was for the benefit of the concerned. If they had found that it was in words, where would have been the question of law ?

The rule discharged.

WHERE A SHIP IS TAKEN AND RECAPTURED, OR NECESSARILY DESERTED, AND THE OWNERS HAVE GIVEN NOTICE OF ABANDONMENT, AND CLAIMED AS FOR A TOTAL LOSS, THE SUBSEQUENT RECAPTURE OR RECOVERY WILL NOT ENTITLE THE UNDERWRITERS TO SETTLE AS FOR A PARTIAL LOSS, IF THE EXPENSES ATTENDANT ON THE RECAPTURE OR RECOVERY ARE CONSIDERABLE, AND THE VOYAGE CANNOT BE ADVANTAGEOUSLY PROSECUTED.

### I.—M'IVER v. HENDERSON.

Feb. 9, 1816.—E. 4 M. & S. 576. Eng. Com. Law Reps., vol. 30.

ASSUMPSIT upon two policies of assurance on the ship *Tartar*, valued at £3000, at and from Liverpool to Sierra Leone; and the plaintiff declares in three counts as for a total loss; in the 1st, by capture; in the 2d, by arrest, restraint, and detainment of the persons exercising the powers of government at Fayal; and 3dly, by capture, barratry of the mariners, and arrest, &c., of the government at Fayal; and alleges in each count, that he had incurred further expense in suing, labouring, and travelling for the recovery of the ship. Money counts. Plea non-assumpsit; and the defendant paid £35, 13s. 4d. per cent. into court.

[\*815] At the trial before Bayley, J., at the summer assizes, at Lancaster, 1814, there was a verdict for the plaintiff for an average loss, with liberty to him to move to enter a verdict for a total loss, if the court should be of that opinion. And upon its being moved for that purpose, the court directed a special case to be made, which was this:—

The two policies, comprising the usual risks and provisions, were made by the plaintiff, and subscribed by the defendant on the 11th and 16th of December, 1813, upon the ship and voyage mentioned in the declaration. On the 29th of December the *Tartar*, with a cargo intended for barter on the coast of Africa for the produce of that country, sailed from Liverpool on the voyage insured, manned with twenty mariners, and carrying sixteen guns. On the 31st of January, 1814, in her course to Sierra Leone, she was captured by a French frigate. The captors took on board the frigate the captain of the *Tartar*, and fourteen of her crew, and plundered or threw overboard a considerable part of her cargo, the greater part of her stores, provisions, and water, thirteen out of sixteen great guns, all her small arms, and all her ammunition, her long boat, instruments, register, and all her papers except the log-book. The French commander then gave her up, thus plundered, to the master of a Portuguese schooner, which he had previously captured and burnt, putting on board the captain of the *Tartar* and fourteen of his crew, fourteen other British sailors, the Portuguese captain, and twenty-one of his crew. The French commander ordered the Portuguese captain to make for the nearest land, which was Buena-Vista. The *Tartar* was left by the frigate very short of provisions and water, and with only an old chart and quadrant, and in this state reached Buena-Vista on the second day after she parted from the frigate, where she took in such provisions and water as could be procured by bartering part of the cargo left on

board by the French. After staying one day at Buona-Vista she sailed for Madeira, but the crew being ungovernable, and often drunk, rose and insisted on going to one of the western islands, and she accordingly sailed for Fayal, and arrived there on the 21st of February. There was no discipline on board, but such command as there was, was exercised by the captain of the Tartar. As soon as she reached Fayal the Portuguese master laid claim \*to the vessel, and to what remained of the cargo as his property, in consequence of the donation of the [\*816] French commander, and instituted proceedings in the ordinary court there. A few days after her arrival the ship and cargo were seized under a written warrant from the court, and Portuguese colours hoisted. The Portuguese master petitioned to land the cargo in order to sell a part for the support of himself and crew, they being then out of all provisions and water. This claim the captain of the Tartar resisted, but the ship was detained at Fayal during the proceedings in the Admiralty Court there. On the 10th of March the captain of the Tartar wrote to the plaintiff to communicate the then state of affairs, and added that he had leave to land the remaining part of his cargo, and to sell it for the benefit of those whom it might ultimately concern, and that he hoped all would soon be settled. On the 1st of April sentence was pronounced by the court in favour of the captain of the Tartar; against which sentence the Portuguese master insisted on appealing. The letter written by the captain of the Tartar on the 10th of March reached the plaintiff on the 4th of April, and the plaintiff immediately communicated it to the defendant and the other underwriters, and gave them notice that he abandoned to them the ship and cargo, and demanded a settlement as for a total loss, which abandonment the defendant and the other underwriters refused to accept. The remaining part of the cargo was landed and sold at Fayal, and the disbursements of ship and crew, and the law expenses were paid thereout, and the remainder the captain of the Tartar was obliged to leave in the hands of a Portuguese to answer the Portuguese master's farther appeal, in order to obtain the release of his ship. From the loss of her cargo, and the other causes, and the want of stores which could not be procured at Fayal, the original voyage became impracticable. On the 11th of May, and not before, the captain of the Tartar got possession of the ship, and on the 12th she sailed from Fayal for Liverpool, and arrived at Liverpool on the 29th. When she left Fayal she could not have been sold there for more than £600, but was worth, to be sold in Liverpool, £1300. The expense of navigating her from Fayal to Liverpool was £221. The sum deposited at Fayal was £427, 18s. 9d., which is to abide \*the event of the appeal. The appeal is against the sentence ordering restitution of the ship and cargo to the captain, and this appeal is still pending. The writ in this action was sued out on the 3d of June, 1814. The money paid by the defendant into court is more than sufficient to pay his proportion of the loss, supposing it to be an average loss.

The question for the opinion of the court is, whether the plaintiff is entitled as for a total loss. If the court should be of opinion that he is,

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the rule to be absolute; if otherwise, the rule to be discharged, with liberty to turn the case into a special verdict.

This case was argued in last Trinity Term by Joy for the plaintiff, and Richardson for the defendant. For the plaintiff it was argued, 1st, that this was a total loss at the time of abandonment. For at that time the ship was captured, plundered, dismantled, and given away; stripped of her cargo, stores, provisions, arms, ammunition, charts, and instruments, without the possibility of replacing them; no part of her trading performed; the renewal of her voyage impracticable; the ship itself in the possession of a foreigner; everything gone but the hull, with little probability of its being restored, except at a ruinous expense. And if all these circumstances combined do not amount to a total loss, what is it that shall constitute a total loss, to entitle an assured to abandon? 2dly, If the abandonment was well made, the plaintiff's right to recover shall not be defeated by subsequent events. For by the abandonment the plaintiff acquired a right to enforce his indemnity from the underwriter presently, because an abandonment is in the nature of a present demand; and as a present demand cannot properly be made without a present right, if there is a present right there is a corresponding obligation to accede to it *de præsenti*." (Per Lord Eldon, C., *Smith v. Robertson*, 2 Dow. 474.) It is true that "to authorize an abandonment there must be actually a total loss, or in the highest degree probable at the time of abandonment;" (per Lord Ellenborough, C. J., *Anderson v. Wallis*, 1 M. and S. 240;) but the right of action does not depend on the abandonment's being accepted, but only upon its being properly made. For all [\*818] the foreign jurists agree that abandonment once made on valid grounds is irrevocable by both parties. Thus Guidon, C. 7, Art. 12, "a ship arriving at a port of safety after abandonment made, must belong with all her profits to the underwriters;" and in the terms of Valin, Art. 60, "by reciprocity of reason after abandonment declared, the assurer cannot under pretext of the return of the vessel dispense with paying the sum insured." So Emerigon, *Traité des Assur.* c. 17, § 6, "My ship is taken; I have abandoned; it is released by the captor, or otherwise regains its liberty; my underwriters are entitled to the benefit of such abandonment without any power in me to deprive them of it, under pretext of the return of the vessel. By identity (*identité*) of reason I have a right to compel them to the payment of the sum insured, without any power in them to defend themselves under the same pretext." And it is added, "abandonment once made is irrevocable." Also Pothier, *Traité du Contract d'Assur.*, No. 35, "Abandonment transfers the property irrevocably to the underwriters;" and Guidon, C. 7, Art. 3, "It is equivalent to a transfer;" and Valin says, Art. 47, "I cannot abandon a ship captured on condition that if recaptured she shall still belong to me;" and again, "After abandonment declared (*signifié*), the effects insured belong to the assurer," Art. 60; and Emerigon, referring to Valin, adds, "This transfer of property is of the very essence of abandonment." Thus it appears that the time of abandonment, and not the time of action brought, is the period to determine the right of the assured to recover for a total loss; and it was resolved in Dom. Proc.

that an assured may abandon notwithstanding the ship is in safety, for the benefit of the owners, *Smith v. Brown*, 1 Dow. 349. *Bainbridge v. Nielson*, 10 East, 329, was decided upon the ground that the assured abandoned under a mistake of fact; so that the abandonment was not well made, and the ship afterwards arrived and earned her freight. Also granting that an unconditional restitution of the ship might have made a difference, there is nothing like it in this case, for *non constat* at this moment that the assured will succeed in the appeal; and the restitution is fettered with a pledge dependent upon the result of the appeal.

For the defendant, it was denied that the abandonment was \*well made. For after the capture, the ship was again resumed [819] by her crew, and the captain had the command of her; and as to the donation made by the French commander, it cannot be supposed that this conferred any right, and so the court at Fayal determined; and though an appeal has been made against this determination, and a deposit required of the assured, it never can be presumed that the result of that appeal will be contrary to all justice, so as to bring the deposit into hazard. And the captain, so far from considering it a total loss, writes that he hoped all would soon be settled. But in order to warrant an abandonment the assured must be ousted of his possession in such a way as to be in its nature permanent; and therefore an embargo is not necessarily a good cause of abandonment. (See *McCarthy v. Abel*, 5 East, 388.) And here the detention was temporary, viz., to abide the event of the Portuguese master's claim, and the ship has since been liberated, and arrived at her port, and the defendant has paid his proportion of the actual damage. And if at the time of bringing the action, the plaintiff has been indemnified, what pretence has he for maintaining it? As if a creditor insure the life of his debtor, to the extent of his debt, and after the death of the debtor, is paid the debt, he cannot recover against the underwriter, *Godsall v. Boldero*, 9 East, 72. Or if that which is in its inception a temporary loss, turn out subsequently, and before action brought, to be only a partial loss, the assured shall not by reason of his abandonment, while the loss was temporary, be entitled to recover as for a total loss, *Bainbridge v. Neilson*, 10 East, 320. As to *Smith v. Brown*, perhaps it was considered that the ship was held for the benefit of all parties; if not so, it seems contrary to *Parsons v. Scott*, 2 Taunt. 365, and other cases.

*Curr. adv. vult.*

LORD ELLENBOROUGH, C. J., on this day delivered the judgment of the court.

This was an action upon two policies of assurance underwritten by the defendant on the ship *Tartar*, brought to recover a total loss, and the question upon the facts stated in the case is, \*whether the plaintiff is entitled to recover as for a total loss, or whether it be an [820] average loss only. [Here his lordship stated the case.] It has not been disputed, nor can it with any colour of argument be contended, that on the 4th of April, 1814, there was not a sufficient ground for the abandonment of the ship, which was on that day made to the underwriters. The ship had been captured, plundered of thirteen out of sixteen of her

guns, and of her stores, and possession of her was not restored till afterwards, *i. e.*, on the 11th of May, 1814. But it has been argued, that as a contract of assurance is a contract of indemnity, therefore the nature of the damnification at the time when the action is brought is to be regarded as the criterion of the right to recover as for a total loss; and if at that time what had antecedently been a total loss had by subsequent events ceased to be so, and had become an average loss merely, that a compensation as for an average loss could alone be recovered; and the case of *Godsall v. Boldero*, 9 East, 72, principally decided upon the authority of Lord Mansfield, in *Hamilton v. Mendez*, as to this point, and the case of *Bainbridge v. Neilson*, 10 East, 329, were cited for this purpose. But in the former of those cases all cause of damnification had ceased before the action brought, and in the latter, (which was an action as for a total loss upon a capture and abandonment as here,) there was an entire restitution of the ship insured in an undamaged state, and she afterwards earned her freight; so that all pretence of total loss with reference to the time of bringing the action had in that case ceased. Here the guns and stores taken out of the ship were never restored, her voyage was completely lost, and the ship itself was never fully liberated and restored, but upon an actual deposit of a large sum, *viz.*, £427, 18s. 9d., to abide the event of the appeal as to the entire right of the property in the ship itself, and subject to the risk not only of the plaintiff's losing that deposit, but of being condemned in damages to a much larger and indefinite amount. Under these circumstances, what can be said to be the limit of the plaintiff's loss? If it is an average loss, who can state the amount of such average? And if not a total loss, by what circumstance, and to what amount is it placed below that standard? The mere [\*821] restitution of the hull, if the plaintiff \*may eventually pay more for it than it is worth, is not a circumstance by which the totality of the loss is reducible to an average one. If no abandonment had been already made, do not sufficient circumstances exist in this case to warrant an original abandonment at the present moment? The voyage is lost: the cargo which was to be conveyed in the ship is wholly gone; she is stripped of a great part of her necessary equipment, stores, and furniture, and the ultimate recovery of anything is uncertain, and attended with the trouble, expense, and hazard of litigation. And can it be said that the effect of an abandonment, unquestionably competent to have rendered the loss a total loss recoverable as such at the time it was made, can be frustrated and disappointed by the continuance in part of the same, and the occurrence in part of other accessory causes of loss of a similar kind? It appears to us that there existed at the time of the abandonment, at the time of the action brought, and that there continue to exist at the present moment, circumstances fully sufficient to entitle the plaintiff to recover as for a total loss.

Rule absolute.



## II.—COLOGAN v. LONDON ASSURANCE COMPANY.

Nov. 22, 1816.—E. 5 M. &amp; S. 446.

IN covenant upon two policies of insurance under seal, effected by the plaintiffs for Barnard Cologan, a merchant at Teneriffe, the first for £1000, the other for £200, on 3224 bushels of wheat, 326 cwt. of fish, and 4284 pieces of staves, valued at £1270, on board the *Friendship*, with the usual clause of warranty as to corn and fish, "free from average, except general," at and from Quebec to Teneriffe; the plaintiffs declared as for a total loss by capture, and by perils of the seas, and averred the interest to be in B. Cologan. The defendants pleaded *non infreg. convent.*, and paid £200 into court. On the trial before Lord Ellenborough, at the London sittings after Hilary Term, \*1815, there was a verdict for £400, with liberty to the plaintiffs to move [\*822] to enter a verdict as for a total loss, and to the defendants to move for a nonsuit, which motions having been afterwards made, the following case was stated:—

In September, 1812, the *Friendship* took on board at Quebec the wheat, fish, and staves mentioned in the declaration, consigned to B. Cologan at Teneriffe; and, on the 5th October, sailed from the river St. Lawrence, under convoy. A few days afterwards a heavy gale of wind dispersed the fleet, and she lost the convoy, and proceeded for Teneriffe until the 22d October, when she was captured by an American privateer. the privateer plundered her of most of her stores, took out all her crew, except the captain and a boy, put a prize-master and ten men on board, and ordered her to Portsmouth in New Hampshire. On the 6th November, whilst proceeding thither, she was recaptured by the *Shannon* and several other of his majesty's ships of war. The recaptors, being very much in want of hands, were at first about to set her on fire, but finally resolved to send her to Bermuda, there being a scarcity of provisions there at that time. They accordingly took seven men from the different king's ships to navigate her. These were inexperienced seamen, and formed a very inadequate crew; and the captain was often obliged to go aloft, and to assist in handling the sails. On her passage to Bermuda the ship made a great deal of water, and at one time it was necessary to keep both her pumps going. There were several times four feet water in her hold, and it was found necessary to throw 471 of the staves overboard. On the 29th November she arrived at Bermuda, at that time making more than twelve inches water an hour. The captain immediately petitioned the Vice-Admiralty Court for leave to land the cargo, on account of the leaky state of the ship. Leave was granted, on finding bail for the salvage; which bail was accordingly given, and the cargo taken out. The ship, on the 15th December, was examined, and reported to require some repairs, but to be worth repairing. Five hundred and eighty-five bushels of the wheat were found to be in such a state, from the sea-water, that the magistrates, out of regard to the public health, ordered it to be \*destroyed. It was wholly unfit for use, and was accordingly carried outside the harbour, and thrown [\*823]

into the sea. The rest of the cargo was landed and warehoused, and part of the remaining wheat was damaged. When the ship arrived at Bermuda the settlement was much distressed for provisions, and a general embargo existed, prohibiting the exportation of them to any place whatsoever. The captain caused the ship, the remaining staves, the fish, and that part of the wheat which was damaged to be put up to sale, in order to ascertain the salvage, keeping back the sound wheat, in expectation that the embargo might be raised. The fish was sold to a profit. The captain purchased the ship on account of and for the benefit of the owners, and those that might be concerned, at the price of £200, which was not more than one-fourth of her value. He then caused her to be repaired, but the repairs were not completed before the 10th or 12th February. The embargo was raised, as far as respected his majesty's West India islands, on the 3d January; but, as to all other places, continued in force until after the *Friendship* sailed from Bermuda. She was released by the Vice-Admiralty Court about the 15th of January, the salvage having been settled. The captain went to the governor to request permission to ship the undamaged wheat, amounting to 2103 bushels, for Teneriffe; which being refused, he directed it to be sold, and purchased it for the owners and those who might be concerned. This took place about the 22d January; and one of the navy contractors having offered the captain to ship flour on board the *Friendship* for Madeira, if the governor's consent could be obtained, the captain agreed to this proposal, provided his wheat were included. Leave was accordingly obtained, as Madeira was then garrisoned with English troops; and the captain took the flour and wheat on board, and sailed for Madeira, where he arrived and delivered his cargo in May. He there took in a cargo of wine, with which he sailed, and arrived in England on the 13th of June. On the 2d of January the captain wrote from Bermuda to his owners in London, the following letter:—

"I am sorry to inform you, that on 22nd October last, in lat. 40° N., long. 35°, I was captured by an American privateer of 18 guns and 100 men; they had possession until the 6th \*November, when [\*824] we were recaptured by his majesty's ships *Shannon*, *Nymph*, *Tenedos*, and *Curlew*, and sent in here. We got in on the 29th, the ship making a great deal of water, and the sails and rigging in a bad condition. The cargo was discharged by an order from the admiralty court. The ship made fifteen inches of water per hour. There were near 600 bushels of the wheat damaged, which were hove overboard. The magistracy would not suffer it to be landed. There being an embargo on all provisions, and the voyage totally defeated, I abandoned, and have sold both ship and cargo. The ship, not going for more than one-fourth of the value, I have bought her in for the interest of all concerned. The wheat, about 700 bushels, sold under its first cost. I thought proper to stop the sale of that, and have petitioned the governor to allow me to re-ship it for London. The other part of the cargo sold for something more than first cost. I would have transmitted you an account of sales; but the wheat still remaining on hand, and not knowing whether I shall have liberty to ship it I have enclosed a copy of protest and survey, and

shall, before I leave this, send home other necessary documents and vouchers. I intend to advertise the ship for London, to sail with the first convoy, and to take whatever freight may offer, not doubting but I shall get a full ship home."

This letter, upon its receipt in London, was communicated to the agents of B. Cologan, who gave the defendants a regular notice of abandonment. The money paid into court was sufficient to cover the salvage, and the general average arising from the foregoing circumstances.

The questions were, whether the plaintiffs were entitled as for a total loss on the whole of the goods insured, or on the 585 bushels of wheat thrown into the sea.

*Campbell*, for the plaintiffs, submitted, first, that here was a total loss of the whole cargo insured; for this was not like those cases, *Anderson v. Wallis*, 2 M. and S. 240; *Falkner v. Ritchie*, 2 M. and S. 290, where the voyage was merely interrupted or retarded, but here was a complete destruction of the adventure. It was a total loss, commencing in capture, and continuing unchanged by any of the subsequent events. Although recaptured, the ship was not set free, nor allowed to [\*825] pursue her course; on the contrary, she was compelled to seek a port, where, by reason of an embargo, she was prohibited from ever afterwards completing her destination; for the embargo still prevailed as to *Teneriffe* when the ship left *Bermuda*. Recapture may, in some instances, *Bainbridge v. Neilson*, 10 East, 329; *Parsons v. Scott*, 2 Taunt. 363, alter the nature of the loss from a total into a partial one; but in others, notwithstanding a recapture, and though some material part of the cargo remain, the loss will still be total, if the disability to pursue the voyage be complete; and then the assured may abandon what is saved, *Goss v. Withers*, 2 Burr. 683; *Milles v. Fletcher*, Dougl. 219; *McIver v. Henderson*, 4 M. and S. 576. And it seems, from the foreign jurists, 1 Emerig. 541, 2 Valin, 134, as well as from our own decisions, *Rotch v. Edie*, 6 T. R. 413, that embargo alone is a sufficient ground for abandonment. Secondly, he insisted, that the plaintiffs were at all events entitled to recover for the 585 bushels of wheat thrown overboard. To this extent the commodity was totally lost to the assured, in consequence of a peril insured against, for it was the sea-water which eventually produced the destruction of this portion of the cargo; and therefore this falls within the authority of *Dyson v. Rowcroft*, 3 B. and P. 474; and *Davy v. Milford*, 15 East, 559; which authorities have much weakened that of *Cocking v. Fraser*, Park, 181, 7th edit.

*Richardson*, contra, argued, that if it should appear that there was not a total loss at the time of action (*Brotherston v. Barber*, 4 M. and S. 419,) brought, and *à fortiori* at the time of abandonment, the plaintiffs were not entitled to recover; and he said it would be strange, if, in this case, where the insurers had provided against any responsibility for partial loss, and where the loss upon one of the articles insured was little more than a tenth, upon another was under a fifth, and upon the third there was no loss at all, the article having sold to a profit, the insurers should nevertheless be held liable. The great bulk of the commodities insured subsisted in specie, in the hands, and at the control,

and had been disposed of by the master for the benefit of the plaintiffs, at the time when they gave notice of abandonment. \*Although [\*826] the embargo remained in force as to Teneriffe, the master might have gone elsewhere, or might have awaited its removal; but he made his election on the part of the plaintiffs to sell. How then can it be competent to the plaintiffs to convert a partial into a total loss by abandonment? Embargo may be, under circumstances, as in *Rotch v. Edie*, where the ship was detained nearly three years, a lawful ground of abandonment; but it is not necessarily so. Unless, therefore, the disappointment in obtaining a market at Teneriffe constituted a total loss, there was nothing to warrant an abandonment. In *M'Iver v. Henderson*, 4 M. and S. 576, the ship, under the restraints imposed upon her, was considered as *quasi* in the hands of the captors, and therefore it might well be considered a total loss. Secondly. He said, that where the commodity remains in specie, though rendered of no value by a peril insured against, according to *Cocking v. Fraser*, a total loss cannot attach; and this law was probably derived from the foreign jurists, because, in such a case, they hold that freight would be due. In *Dyson v. Rowcroft*, not only the whole cargo was thrown overboard, but the ship was unable to proceed on the voyage. This differs from both those cases; because here the bulk remains, but a part is thrown overboard. And is not this rather a partial loss of the whole than a total loss of a part? If, not, however minute the portion extinguished, the underwriter will be liable, although he has excepted all partial loss. In *Davy v. Milford* the loss was from an immediate peril of the sea, and not as here only a consequence of it.

Lord ELLENBOROUGH, C. J.—This seems to me to be a case of total loss, and on this ground, that, by the capture, a total loss occurred in the first instance; and while the assured had no reason to believe that events had changed the nature of this loss, they abandoned. The case states that they gave a regular notice of abandonment, by which we must understand, complete in its form, to give it due effect as an abandonment. Now, where there has been a total loss and an abandonment, we must look to the situation of things before action brought, in order to ascertain whether the assured has since been restored to his rights, so as to do away the effect of the abandonment. \*In the present case, [\*827] certainly, there has not been any restitution, considering it with reference to the main purpose of prosecuting the voyage insured. By an embargo at Bermuda, a prohibition was interposed to forwarding the cargo to Teneriffe; this, of course, defeated the voyage. I cannot, therefore, say, that what was a total loss at the time of abandonment ever became otherwise, from that time to the time when the action was brought; on the contrary, it appears to be a continuing total loss, unredeemed by subsequent events. It is said, that if the plaintiffs recover, a partial loss will attach on the insurer, contrary to the agreement and intention of the parties; but this objection is answered, if the loss be entire by the capture, and nothing has happened since to redeem it. On this principle, the case of *M'Iver v. Henderson*, and other cases, determined that the assured had a right to abandon. As to the other point,

if it were material, I should incline to the opinion of Lord Alvanley in *Dyson v. Rocroft* in preference to that of Lord Mansfield in *Cocking v. Fraser*. Considering the contract of insurance as a contract of indemnity, it surely cannot be less a total loss because the commodity subsists in specie, if it subsist only in the form of a nuisance. There is a total loss of the thing, if, by any of the perils insured against, it is rendered of no use whatever, although it may not be entirely annihilated. But it is not necessary to go further into this, the great question being, whether this is a total loss, unredeemed by subsequent events, upon which I have already stated my opinion.

BAYLEY, J.—It appears to me, that, according to the facts stated in this case, the plaintiffs were warranted in making abandonment, and that nothing which afterwards happened has deprived them of the right to insist on this abandonment. At one period, doubtless there was a total loss, by the capture of the ship; circumstances might have intervened which would have changed this loss from a total into a partial loss. The object of the policy is, to insure the risk against failure, by reason of any of the perils mentioned in the policy; that is, in the present instance, that the cargo should reach the port of destination. The destination is to Teneriffe; the ship, \*with the cargo, in her course thither, is captured; recapture follows, but not so as to [\*828] enable the ship to proceed to Teneriffe; for she is sent to Bermuda, where she is placed under an embargo, from which she is never released, except upon condition of altering her destination to Madeira. Therefore there has been no restitution of any part of cargo, as it regards the risk insured to Teneriffe. If this be so, it follows, that the ship and cargo never were effectually redeemed from capture; and the plaintiffs are entitled to recover as for a total loss.

ABBOTT, J.—Capture operates as a total loss, unless it be redeemed by subsequent events. Here no such events have occurred as to restore the goods to the plaintiffs, and place them under their free control. I do not consider an abandonment as having the effect of converting a partial into a total loss; but here the loss was total in the first instance, and continued so ever after. The abandonment, however, excludes any presumption which might have arisen from the silence of the assured, that they still meant to adhere to the adventure as their own. It is not necessary to offer any opinion on the second point; if it were I should strongly incline to the conclusion that this was a total loss of part.

HOLROYD, J.—I am of the same opinion. This was a total loss by capture, and has never ceased to be so. What was done here was entirely the act of the recaptors; who, instead of forwarding the ship to her port of destination, sent her to Bermuda, and neither the ship-owner nor owner of the goods ever had possession of her again. Therefore, as it seems to me, the loss continued to be a total loss by capture, as it was in its commencement. On the other point, the inclination of my opinion is, that after part of the whole cargo was thrown overboard, there was a total loss by perils of the seas of that part.

Judgment for the plaintiffs for a total loss.

## [\*829] \*III.—HOLDSWORTH v. WISE.

Hilary Term, 1828.—E. 7 B. & C. 794. Eng. Com. Law Reps., vol. 14.

ASSUMPSIT on a policy of assurance on the ship *Westbury*, valued at £1800, at and from Belfast to her port or ports of loading in British America, (river St. Lawrence excepted,) during her stay there, and back to a port of discharge in the United Kingdom, between Falmouth and Greenock, on the west side of England and Scotland, or a safe port in Ireland; to call at Cork for orders. Averment, that the vessel sailed from Belfast to St. Andrews, New Brunswick, being a port in British America, not on the river St. Lawrence, and afterwards departed thence back to her port of discharge, to wit, Valentia, being a safe port in Ireland; and on her homeward voyage was totally lost by perils of the sea. Plea, the general issue. At the trial before Hullock, B., at the Lancaster Summer Assizes, 1827, it appeared, that the vessel sailed from Belfast in ballast, on the 23rd of June, 1826, at which time she was sea-worthy. She arrived at St. Andrews on the 22d of August, and sailed thence, on her homeward voyage, on the 16th of September, laden with timber. At that time the vessel made eight or ten inches of water an hour, and the crew were obliged to pump her out every two hours. She continued in the same state until the 20th of September, when she encountered a gale of wind, by which she was much strained, and afterwards was found to be so leaky that the crew thought it necessary to abandon her. On the 23d they hoisted a signal of distress, and a vessel called the *Columbia* seeing it, bore down to her assistance, and took the crew on board. No attempt was made by the crew of the *Columbia* to save the *Westbury*, but they sailed to Boston, and there landed the crew of the *Westbury*. On the 6th of November, the plaintiffs gave notice of abandonment to the agent of the underwriters at Liverpool. On the 24th of September, the day after the *Westbury* was deserted by her crew, she was found by an American vessel called the *Boliviar*, and the captain put some men on board, who succeeded in navigating her to New York, where she arrived on the 14th of October, and intelligence [\*830] of her \*arrival at that port was received at Liverpool on the 16th of November. The *Westbury*, on her arrival at New York, was taken possession of by the British consul, and under his sanction was repaired by Messrs. Barclay, agents for Lloyd's at New York. The expense of her repairs, together with salvage, amounted to £1000, and a bottomry bond was granted by the captain, (who was appointed by the British consul,) to Messrs. Barclay for £850. She then sailed for Liverpool, and on her arrival there possession of her was taken by Messrs. Barclay and Co., claiming title under the bottomry bond and a right to be reimbursed other expenses incurred, making their demand above £1200. The vessel met with further damage in the river Mersey, the repairs whereof were estimated at £858. The learned judge left it to the jury to say, whether the ship was sea-worthy when she sailed from Belfast. Whether the captain and the crew acted *bona fide* in deserting the ship, and whether notice of abandonment was given in a reasonable

time? The jury answered all the questions in the affirmative, and found for the plaintiffs for a total loss. In Michaelmas Term a rule *nisi* for a new trial was obtained on two grounds, viz., that the misconduct of the captain in sailing from Boston with a vessel making ten inches of water per hour exonerated the underwriters, and that the loss was at all events only an average, and not a total loss.

*Pollock and Parke* showed cause.—The jury found that the ship was sea-worthy at the commencement of the voyage; her condition when at Boston was therefore immaterial. Supposing the captain to have acted imprudently in leaving that port with his ship in such a condition as to require pumping every two hours, still that was nothing more than negligence on his part, which does not discharge the underwriters, *Busk v. Royal Exchange Assurance*, 2 B. and A. 73; *Bishop v. Pentland*, 7 B. and C. 219. [BAYLEY, J.—*Walker v. Maitland*, 5 B. and A. 171, is to the same effect.] Several facts applicable to the second point are perfectly clear. The vessel was deserted by the crew acting *bona fide* for their own preservation. Notice of abandonment was given before the news of her safety had been received, and when she arrived at Liverpool she was \*subject to a charge of £1200, and incurred fresh [\*831] damage in the river to the extent of £858. The declaration alleges that the subject-matter of the insurance has been totally lost to the proprietor, that it has become of no use or value to him. Did, then, the desertion of the ship in consequence of perils of the sea produce a total loss? At one period of time, no doubt, the loss was total. Has the ship ever been beneficially restored to the assured? She has not, in fact, been restored at all. She is still in possession of the salvors; but actual restoration of the ship in specie, if not beneficial, would not suffice to change the total into an average loss, *M'Iver v. Henderson*, 4 M. and S. 576. The case of *Thornley v. Hebson*, 2 B. and A. 513, was very different; there the vessel was never entirely deserted, and there never was at any time a total loss; the vessel was always in the possession of persons acting for the benefit of the original owners.

*Brougham and Starkie*, contra.—It must be admitted that the vessel was sea-worthy when she sailed for Boston, so that the implied warranty of sea-worthiness was fulfilled; but there was another implied warranty, viz., that there should be a captain and crew of competent skill, *Tait v. Levi*, 14 East, 481. In *Tatham v. Hodgson*, 6 T. R. 659, *Lawrence, J.*, says, "I do not know that it was ever decided that a loss arising from a mistake of the captain was a loss within the perils of the seas." A policy of insurance on a ship must, in like manner as all other policies, be subject to this qualification, that the subject-matter of insurance shall not be exposed to any unreasonable degree of risk. Here the captain must have been grossly ignorant, and exposed the ship to a very unwarrantable danger by sailing from Boston when his ship was to leaky as to make eight or ten inches of water an hour. Then as to the second point, *Thornley v. Hebson* is a strong authority for the defendants. There the vessel was abandoned by the crew, but taken possession of on the same day by other persons, and it was held not to be a total loss. Here the vessel was taken possession of on the morning after the crew left her,

but whether she was left deserted a few hours more or less, cannot affect the question of total or average loss. In cases of recapture, the [\*832] \*loss is not total if the ship be in good safety at the time of bringing the action, *Faulkner v. Ritchie*, 2 M. and S. 290; and the same principle must apply to a case of this nature, where the vessel has been once deserted, but possession afterwards taken by other persons, and the vessel brought into a place of safety before action brought.

BAYLEY, J.—I abstain from delivering my opinion upon the first point, because there is another case pending in this court, in which the question as to the effect of negligence in the captain of a ship will be again discussed. Upon the other point there is no difficulty. If the subject-matter of insurance ultimately exists in specie, so as to be capable of being restored to the hands of the assured, there cannot be a total loss unless there has been an abandonment. Now, in order to justify an abandonment, there must have been that, in the course of the voyage, which at the time constituted a total loss. Thus, capture or the necessary desertion of the ship constitutes a total loss. Here, then, for a time, there was a total loss. The crew of the *Westbury* were taken on board the *Columbia*, and no effort was made by the crew of the latter vessel to save the *Westbury*, probably because her situation appeared to be hopeless. Then notice of abandonment was given, at which time no tidings of the *Westbury* had been received, and she did not arrive until long afterwards. If at one period of time there was a total loss and an abandonment before news of the vessel's safety had been received, her subsequent return did not entitle the underwriters to say that it was no longer a total loss. The case of *Thornley v. Hebson* may be laid out of the question, for the single point decided there was that there had not been at any period of time a total loss. There are cases which show that the mere existence of a ship after a total loss and abandonment will not reduce it to a case of partial loss, *McIver v. Henderson*, 4 M. and S. 576; *Cologan v. The London Assurance Company*, 5 M. and S. 447. The ship must be *in esse* in this kingdom under such circumstances, that the assured may, if they please, have possession, and may reasonably be expected to take it. Here such circumstances do not exist. The ship was valued [\*833] at £1800 in the policy; she came \*back subject to a charge of £1200, and in the river at Liverpool sustained further damage to the extent of £858. There was no prospect that she could be of sufficient value to make it worth while for the assured to take her again. The loss was therefore total, and the abandonment good.

HOLROYD and LITLEDALE, Js., concurred.

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In the case of *Goss v. Withers*, 2 Burr. 683, the ship had been captured on the 23d December, 1756, and the sailors taken out and carried to France. It remained in the hands of the enemy for eight days, and was then retaken by a British privateer, and brought into Milford Haven on 18th January, 1757. Immediate notice was given to the assured by the underwriters to abandon the ship to their care. It was also proved at the trial that before the capture by the



enemy a violent storm had separated the ship from her convoy, and disabled her so far as to render her incapable of proceeding on her destined voyage without going into port to refit. It was also proved that part of the cargo was thrown overboard during the storm, and that the rest of it was spoiled while the ship lay at Milford Haven, after the offer to abandon, and before she could be refitted. The questions submitted for the opinion of the court were,—1st, “Whether this capture of the ship by the enemy was or was not such a loss as that the insurers became liable thereby? 2d, Whether under the circumstances of this case the assured had or had not a right to abandon the ship to the assurers after she was carried into Milford Haven? Lord MANSFIELD observed—“The single question upon which this case turns is, Whether the insured had, under all the circumstances, upon the 18th of January, 1757, an election to abandon? The loss and disability was in its nature total at the time it happened. During eight days the plaintiff was certainly entitled to be paid by the insurer as for a total loss: and in case of a recapture the insurer would have stood in his place. The subsequent recapture is at best a saving only of a small part: half the value must be paid for salvage. The disability to pursue the voyage still continued. The master and mariners were prisoners. The charter party was dissolved. The freight (except in proportion to the goods saved) \*was lost. The ship [\*834] was necessarily brought into an English port. What could be saved might not be worth the expense attending it, which is proved by the plaintiff’s offer to abandon. The subsequent title to restitution arising from the recapture, at a great expense, of the ship disabled to pursue her voyage, cannot take away a right vested in the insured at the time of the capture. But because he cannot recover more than he has suffered, he must abandon what may be saved. The better opinion of the books says,—‘*Sufficit semel extitisse conditionem, ad beneficium assecurati, de amissione navis; etiam quod postea sequeretur recuperatio: nam per talem recuperationem non poterit præjudicari assecurato.*’ I cannot find a single book, ancient or modern, which does not say, ‘that in case of the ship being taken, the insured may demand as for a total loss, and abandon.’ And what proves the proposition most strongly is, that by the general law, he may abandon in the case merely of an arrest, on an embargo, by a prince not an enemy. Positive regulations in different countries have fixed a precise time before the insured should be at liberty to abandon in that case. The fixing a precise time proves the general principle. Every argument holds stronger, in the case of the other policy with regard to the goods. The cargo was in its nature perishable, destined from Newfoundland to Spain or Portugal; and the voyage as absolutely defeated, as if the ship had been wrecked, and a third or fourth of the goods saved. No capture by the enemy, though condemned, can be so total a loss as to leave no possibility of a recovery. If the owner himself should retake at any time, he will be entitled; and by the act of parliament, if an English ship retakes at any time, (before condemnation or after,) the owner is entitled to restitution upon stated salvage. This chance does not suspend the demand for a total loss upon the insurer; but justice is done by putting him in the place of the insured, in a case of a recapture. In questions upon policies the nature of the contract as an indemnity and nothing else, is always liberally considered. There might be circumstances under which a capture would be but a small temporary hindrance to the voyage; perhaps none at all: as if a ship was taken, and in a day or two escaped entire, and pursued her voyage. There are circumstances under which it would be deemed an average loss: if a ship taken is immediately ransomed by the master and pursues her voyage, there the money paid is an average loss. And in all cases the insured may choose ‘not to abandon.’ In the second part of the ‘Usage and Customs of the Sea,’ (a French book translated into English,) a treatise is inserted called ‘Guidon:’ where, after mentioning the right to abandon upon a capture, he adds, ‘or any other such disturbance as defeats the voyage, or \*makes it not worth [\*835] while, or worth the freight to pursue it.’ I know that in late times the privilege of abandoning has been restrained for fear of letting in frauds; and the merchant cannot elect to turn what at the time when it happened was in its nature but an average loss into a total one by abandoning. But there is no danger of fraud in the present case. The loss was total at the time it happened.

It continued total as to the destruction of the voyage. A recovery of anything could be had, only upon paying more than half the value, including the costs. What could be saved of the goods might not be worth the freight for so much of the voyage as they had gone when they were taken. The cargo from its nature must have been sold where it was brought in. The loss as to the ship could not be estimated, nor the salvage of half be fixed, by a better measure than a sale. In such a case there is no colour to say that the insured might not disentangle himself from unprofitable trouble and further expense, and leave the insurer to save what he could. It might as reasonably be argued, that if a ship sunk was weighed up again at a great expense, the crew having perished, the insured could not abandon, nor the insurer be liable, because the body of the ship was saved. We are therefore of opinion that the loss was total by the capture; and the right which the owner had after the voyage was defeated 'to obtain restitution of the ship and cargo, paying great salvage to the recaptor,' might be abandoned to the insurers after she was brought into Milford Haven."

WHERE THE OWNER OF A VESSEL INSURED ABANDONS HER TO THE UNDERWRITERS, AND CLAIMS AS FOR A TOTAL LOSS THE UNDERWRITERS BECOME THE OWNERS OF THE VESSEL, AND AS ASSIGNEES ARE ENTITLED TO THE FREIGHT SUBSEQUENTLY EARNED, THE FREIGHT FOLLOWING AS AN INCIDENT THE PROPERTY IN THE SHIP.

### I.—CASE v. DAVIDSON.

May 7, 1816.—E. 5 M. and S. 79.—Affirmed. 2 B. and B. 379. Eng. Com. Law Reps., vol. 6.

ASSUMPSIT for money had and received, and the money counts. Plea, general issue. On the trial before Lord Ellenborough, C. J., at Guildhall, in Trinity Term, 1815, there was a verdict for the plaintiff for £71, 12s. 10d. damages, subject to the opinion of the court upon the following case:—

Messrs. Brotherston and Begg were owners of the vessel called the [\*836] *Fanny*, which was a general seeking ship, and sailed \*on a voyage from Rio de Janeiro to Liverpool with a cargo of goods on freight, the property of different persons. On the 27th January, 1814, Messrs. Brotherston and Begg insured the vessel on the said voyage, valued at £7000; and on the 22d April following they insured the freight of the said voyage by other policies, and with other underwriters, and valued the same at £4000. The vessel with the cargo was captured in the course of the voyage by an American privateer, and thereupon Messrs. Brotherston and Begg gave notice of abandonment at the same time to the respective underwriters on ship and freight, who severally accepted the same. Afterwards the vessel was recaptured by one of his majesty's ships of war, was brought to London, and was by decree of the High Court of Admiralty restored to the owners with the cargo, on payment of salvage and expenses. The vessel arrived at Liverpool and delivered her cargo and earned the freight. It was agreed between the ship-owners and the underwriters on ship, (but not by the underwriters on freight,)

that the defendants should sell the ship and receive the proceeds thereof, and should also receive the freight of the cargo for the use and benefit of all persons respectively who should legally be entitled to it. The underwriters on ship and freight severally paid or satisfied the ship-owners for a total loss. The underwriters on ship paid the loss on ship before the underwriters on freight paid the loss on freight. The defendants received and paid to the underwriters on ship the amount produced by the sale of the ship, which was about £33 per cent. on their subscriptions. The defendants also received the freight, which they held under the terms of the agreement, and which is £35, 16s. 5d. per cent. clear on the sum insured on the ship. The underwriters on ship and also the underwriters on freight severally claimed from the defendants the freight thus received. The plaintiff is an underwriter on ship to the amount of £200, and claims to recover a proportion of the money received by the defendants for freight. The question for the opinion of the court is, whether the plaintiff is entitled to recover. If he is entitled, the verdict to stand, otherwise a nonsuit to be entered.

This case was argued partly in last term, and partly on this \*day, by Richardson for the plaintiff, and Littledale for the defend- [\*837] ants. For the plaintiff two points were made, first, that the abandonment of ship conveyed to the underwriter on ship the ship's future earnings; secondly, that the underwriter's title to the earnings was not affected by an abandonment to the underwriter on freight. In support of these propositions were cited the cases of *Thompson v. Rowcroft*, 4 East, 34; *Leatham v. Teray*, 3 Bos. and Pull. 479; *McCarthy v. Abel*, 5 East, 388; *Sharpe v. Gladstones*, 7 East, 24; and *Chinnery v. Blackburne*, 1 H. Bl. 117; *Splidt v. Bowles*, 10 East, 279; *Morrison v. Parsons*, 2 Taunt, 407, were referred to *arguendo*, as showing, that by an assignment of the ship, the freight passes to the assignee, and payment of it to him will be good; though if the ship be chartered the assignee cannot, by reason of a technical rule of law, maintain an action for the freight in his own name.

For the defendants it was urged, that as by the law of England freight might be made a distinct subject of insurance from ship, the law would so mould these contracts, where they concurred, as to preserve the rights of the respective parties distinct, and apply to each what properly belonged to it. Wherefore an underwriter on ship who insures but the hull, materials, body, tackle, and apparel of the ship, shall not, by an abandonment, be entitled to the earnings; for this would be to confound the two species of abandonment, and would render an abandonment of freight of no avail. It is true, indeed, that the beneficial interest in the freight passes by assignment of the ship; the reason of which is, because upon the purchase and sale of a ship, both parties intend that not only the body of the ship, but all its incidents should pass, and agree upon a price accordingly; whereas a contrary intention seems necessarily to arise, where there is a separate abandonment of ship and freight. Abandonment, therefore, differs from a transfer of the ship upon a sale, and extends no farther than to the thing insured.

Lord ELLENBOROUGH, C. J.—Although this question now comes dis-

tinctly in judgment before us for the first time, yet it has, I own, been [\*838] long considered in my mind as settled, that \*freight follows as an incident the property in the ship; and therefore, as between the respective underwriters on ship and freight, an abandonment of the ship carries the freight along with it. This subject was much under discussion at the time of the Russian embargo, when the rights of the respective sets of underwriters were considered. I believe it was at that time said, that an abandonment to the underwriters of ship, like the *traditio rei*, divested the owner of all his rights in favour of the party to whom he abandoned. The underwriter, indeed, does not become privy by virtue of such abandonment to any existing charter party, nor perhaps to any contract of affreightment before made with the owner; but I think that by the abandonment he acquires possession of the thing from use of which freight is to be earned. It is true that the ship-owner may have entered into contracts for the insurance of freight, and that by abandonment of the ship the underwriters on freight will be deprived of some rights to which they would perhaps otherwise be entitled; but this will necessarily happen if the underwriter on ship is entitled to look, without reference to the contracts of other persons, to his own contract, and to those consequences which result to him from abandonment. An abandonment to the underwriter on ship transfers to him not merely the hull but the use of the ship, and the advantages resulting from the completion of the voyage. If upon the completion of the voyage the abandonnee may withhold the goods until the freight is paid, he must have acquired an indefeasible title to it. I consider his title as derived out of the use of the ship. It is true, that by the usage of this country, the ship-owner may insure his freight, but that is not to interfere with the insurance on ship; the underwriter on ship is to have his rights entire, which are not to be affected by other contracts that the ship-owner may think proper to engage in; and after abandonment the underwriter on ship is the person to be considered in possession. In the present case, the voyage has been completed, freight has been earned, and has been received by the defendants for the use of such persons as are entitled; and the question is, who those persons are? to which I answer, The person whose ship earned the freight, and that is the abandonnee. This subject has [\*839] been on several occasions in \*the mind of the court, but more particularly in *Sharpe v. Gladstone*, and *Morrison v. Parsons*; and what was said in the latter case by Lawrence, J., namely, that the right to freight subsequently accruing must belong to the assignee of the ship, as incident thereto, was not new doctrine at that time, but had been intimated before by that learned judge as his opinion; indeed, there seems to have been a concurrence of opinion in Westminster Hall upon that point. The underwriter on freight will certainly, by this doctrine, lose the specific thing abandoned to him, except where the assured is entitled to the freight; but abandonment of the freight cannot break in upon the rights of those who are entitled to the ship. And I own it seems to me that it cannot make a difference whether the underwriter on ship has or has not notice of the insurance on freight; for I rest on this simple ground that the abandonnee of ship has all the rights of the ship-

owner cast upon him, by operation of that emphatic word in the law-merchant, "abandonment;" and being so entitled, has a right, if he uses the ship for completing her voyage, to her earnings, as against all the world. Who are the persons liable to pay the wages I do not think is a question here; very likely the sailors might libel the ship, and the abandoner might be liable.

BAYLEY, J.—I think this is a question of considerable difficulty, and it has made a different impression on my mind from that of my lord, and, I believe, the rest of the court. We have considered the subject a great deal before we arrived at this stage of the case, and seeing that we are not likely to come to a unanimous agreement upon it, it is better that we should declare our opinions without further delay. This is an action by the underwriter on ship against a person who has received and holds the freight for the use of the party entitled to it. At one period of the adventure there was a capture, and there was a contemporaneous abandonment to the respective underwriters of ship and freight. The ship was afterwards recaptured, and completed her voyage, and ultimately earned freight; and the question is, if the underwriter on ship is entitled to have ship and freight, or only the ship; and the underwriter on freight to have the freight. Now the impression of my \*mind is, with [840] deference to my lord, that an abandonment of ship under such circumstances, from the nature of the subject-matter, implies a virtual exception of the freight. Where ship and freight are comprehended, as is most usual, in one insurance, they are insured as one entire subject; but where the insurance is separate they ought to be considered, to the termination of the adventure, as separate subjects. Freight is compounded of several considerations,—it includes the wear and tear of the ship, the provisions and wages of the crew, and a reasonable return of profit to the owner for the employment of his capital. The underwriter on ship understands that he insures only the body, tackle, and apparel of the ship. I agree that the ship-owner, in ascertaining the value to be insured, includes in his calculation not only the value of the ship, but also the expenses of the outfit; and this creates some difficulty, because when a loss happens, it is computed, I believe, upon the value at the time the ship set sail, and not at the time of the loss; and as this value is constantly diminishing as the voyage proceeds, it may be said that the freight is no more than an equivalent for this decrease in value. Nevertheless, it seems to me that the underwriter on ship has no right to expect from an abandonment more than he has insured, that is, the hull, tackle, and apparel of the ship, in the plight in which she is at the time of abandonment. If the ship completes her voyage, it is so much saved to him. I am not sorry that the opinion of the court is against me, for I think the consequence will be, that in future there never will be an abandonment of ship. If by abandoning the ship, the assured must be deemed to have abandoned the freight, there cannot be any abandonment to the underwriter on freight; and the assured may be liable to the underwriter on freight for the freight. The mariners value on him for wages, and he is obliged to pay them. It is true, that they may proceed against the ship in the Admiralty Court, but they are not

bound to go thither, and may sue the owner; and the master of the ship cannot go to the Admiralty Court. That seems to me to place the ship-owner in such a predicament upon abandonment that it will not allow him for the future to make abandonment of ship. I do not quote the cases of *Sharpe v Gladstones*, and *Barclay v. Stirling*, because they do [\*841] \*not involve any question between the two sets of underwriters. But I ask, upon what principle is the underwriter on ship to be entitled to freight? Suppose the ship to have performed nine-tenths of her voyage at the time of abandonment, the underwriter, if entitled to the freight, will receive the whole benefit and earnings of the voyage, although he is only at a few days' expense for provisions. This would be the consequence of its being understood that by abandonment of ship it is the intention of the assured to abandon all the rights belonging to her. If this is to be taken as the intention, I agree that the underwriter is entitled to the growing freight; but it seems to me, from the nature of an abandonment, and from the constant practice which has prevailed of insuring freight separately, that it must have been the understanding of these parties that an abandonment of the ship should not carry with it the freight. If this be not so, it is wonderful that the question has never been raised, so as to settle the right of the abandonnee of ship to the freight. For these reasons, I think the plaintiff is not entitled.

ABBOTT, J.—I am of opinion that the plaintiff is entitled to recover. The question comes now for the first time to be decided, but it is not new to the court; an opinion has been expressed upon it in several cases. Nor is it by any means a new point to the minds of professional men, who have been at all conversant with the law-merchant. Now this is a principle clearly established, that if the ship be sold, the vendee is entitled to the freight as an incident to the ship. And on that principle I found my judgment in this case, being of opinion that an abandonment is equivalent to a sale of the ship. And considering freight to be an incident, I cannot engraft upon the effect of an abandonment any exception, but take it to be a complete transfer of all the rights which are consequent upon a sale of the ship. It was argued by Mr. Littledale, that since a practice has prevailed in this country of insuring ship and freight separately, the underwriter on ship must contemplate that inasmuch as freight may be the subject of a separate insurance, it may also be separately abandoned. But this argument is built upon an assumption that [\*842] an abandonment of freight \*conveys to the abandonnee a right to the freight in preference to the right of the abandonnee of ship; which is assuming the whole question. As well might it be argued, that as the underwriter on freight is aware that the ship may be separately insured, he must therefore be taken to know that an abandonment of the ship will convey all the incidents belonging to it to the abandonnee. The practice, therefore, of insuring ship and freight separately seems to me to afford no argument whatever either way to show what the law is or ought to be. If it had been the practice, that upon separate insurances the abandonnee of freight should take the freight notwithstanding an abandonment of the ship, such a practice might have afforded a construction; but we do not find that there has been any such practice. It

was further contended by Mr. Littledale, that supposing this freight had not been insured, the ship-owner and not the underwriter on ship would have been entitled to it after abandonment of the ship; but I did not observe that he cited any authority for this position, and the practice, I believe, has been the other way. I have never heard of an instance in which the assured, after abandoning the ship to the underwriter, has stepped in and claimed the freight as against the underwriter; on the contrary, the practice has been uncontested that the abandonee has received the freight. It may, perhaps, be a question, as between the underwriter on freight and the ship-owner after abandonment, to whom the freight belongs; but this question it is unnecessary at present to touch. It has been observed that nothing is to be found in the foreign writers in favour of this claim of the underwriter on ship. Foreign writers, I am aware, are not to be stated as authorities in this court; but I find one learned foreign writer in commenting on the 15th Article, tit. Insurance, Valin, Liv. iii. tit. 6, des Assurances, Art. 15, which prohibits the insurance of freight, is of opinion that freight is an incident to the ship, and must from its nature follow it. And he puts an instance of a voyage to the West Indies, where it is usual to stipulate for the freight on putting the goods on board. He then supposes that the ship is lost in the voyage, and that the goods are saved in part or in whole; and concludes that the ship owner, in making abandonment, is bound to answer to the underwriter for so much of the freight as is received. A stronger mode of illustrating his opinion that the [\*843] freight accompanies the ship cannot be put. Although I do not quote this as an authority, yet it is satisfactory to know that my opinion concurs not only with that of other judges, but also with that of foreign writers upon this subject.

HOLROYD, J.—I am also of opinion that the plaintiff is entitled to recover, and I would adopt the same line of argument that has been taken by my lord and my brother Abbott. It appears to me that when the ship-owner abandons his ship to the underwriter, the latter stands in all respects as to future benefit in place of the owner. The underwriter pays the whole loss, and in consequence becomes *quasi* owner instead of the former owner. It follows as a consequence of abandoning the ship that the owner divests himself of his right to freight, which is incident to the ship, and the same becomes vested in the abandonee, to whom it is competent to possess himself of the ship, and if she should be unfreighted to endeavour to obtain for her a freight. And if the ship be freighted, yet, as it seems to me, the underwriter is not bound to complete the voyage, because the rights of the owners of the goods laden on board are personal, lying in contract with the ship-owner, and not running with the ship; and being in respect of a personal chattel, an action lies not against the underwriter, but against the owner alone. Put the case of a voyage from London to Madeira, or perhaps the West Indies; an insurance is effected from London to the West Indies, with leave to touch at Madeira; a loss happens before the ship reaches Madeira, and the assured abandons; is not the underwriter entitled to the freight if he carries on the goods to the West Indies? I apprehend he is; for otherwise it would follow that

he could not possess himself of the ship until her return home. Upon these grounds it appears to me that the abandonee becomes entitled immediately to all the earnings of the ship as a consequence of the abandonment.

Judgment for the plaintiff.

[\*844] \*II.—STEWART v. GREENOCK MARINE INSURANCE COMPANY.

Jan. 13, 1846.—S. 8 D. 323.—Affirmed house of lords, Sept. 1, 1848.—1 Macqueen, 328.

THIS was an action as for a total loss, on which the jury returned the following verdict:—The jury “say, upon their oath, that in respect of the matters proven before them, they find for the pursuers, in respect that the *Laurel* was properly abandoned and not worth repairing: That her damage arose from her coming in contact with an iceberg, and also from grounding at the dock at Liverpool: Also find that the ship was perfectly seaworthy; reserving for the decision of the court, the point raised by the defenders of their title to a proportion of the freight: Also find that the vessel was a total loss, irrespective of the decayed timber and deficient sails.”

The freight was insured for £1500; with the Scottish Marine Insurance Company for £1000, and with the Aberdeen Marine Insurance Company for £500, these being also the companies with which the balance of the insurance upon the ship was effected, and who agreed, as stated in the report, 6 D. 356, that the issue of the present cause should be conclusive also with them. The amount of freight recovered by the owners was £1402, 2s. 2d.

The judges of the first division being equally divided in opinion as to whether the underwriters on the vessel were entitled to the freight recovered by the owners, the other judges were consulted, when the following opinions were returned:—

Lord MONCREIFF.—I am of opinion that the freight belongs to the underwriters, and that the defenders in this action are entitled to credit for the just proportion of it, corresponding to the sums in the two policies sued on, in settling as for a total loss under these policies.

It is settled by the verdict, as a verdict for the pursuers affirmative of the question in the issue, that in terms of that issue the ship *Laurel*, by and through the injuries she sustained at the two dates therein specified, and during the currency of the policies, became a wreck, and was totally lost. It is at the \*same time ascertained by the verdict, that [\*845] this result, found as matter of fact, and therefore to be taken as matter of law, is brought about by the special fact, that the vessel, though ultimately brought into dock, was found to be in such a state, in consequence of the injuries referred to, that she was not worth repairing, and was properly abandoned by the owners to the underwriters.



It is a case, then, in which the owners have been found entitled to treat the vessel as a total loss, produced by perils of the sea during the currency of the policies, and of course within the space of the voyage insured, and on that footing to recover the full sums expressed in the policies on that account, subject to the point reserved in the verdict; and the case so stands, notwithstanding that, in reality and on the face of the verdict, the vessel, or the timbers and tackle which composed it, were not literally lost altogether, but were ultimately placed in dock in the port of discharge.

There can be no doubt of the legal correctness of such a result being established by the verdict of a jury, assuming, of course, that the evidence laid before them was sufficient to warrant it; and it has not been objected to in this case. But it is evident that, in legal effect, it is not an actual, but a constructive total loss, that is found to have taken place. Though to be taken in the question of insurance as a total loss, there is something still remaining of the subject of the insurance, and it is found that that was properly abandoned or given up by the owners to the underwriters.

Thus it is a case of constructive total loss, which entitles the owners to abandon or surrender the subject to the underwriters, and to claim upon the policies the full sums stipulated, as in the event of total loss. This constructive total loss, must, I apprehend, as matter of law, and does as matter of fact on the face of the verdict, arise from the injuries sustained by the vessel, first from the violent contact with the iceberg, and then, in combination with that, from the grounding while she lay outside the dock. It was by these facts, occurring before the completion of the voyage, that the vessel was brought into that state of wreck, on which the jury have held themselves warranted and bound to find that she was properly abandoned as \*a total loss to the underwriters. The notice of abandonment, though not absolutely necessary in all [\*846] cases, was in this case at least a proper, and, I rather think, a necessary measure, to certify the underwriters of the resolution of the owners, as soon as the facts concerning the state of the vessel, which have been found to warrant it, could be ascertained, in order that the underwriters might be aware that the remains of her, with all her benefits, though in port, lay at their risk, and might take what measures for their own protection or relief they might think proper. But it is not the notice of abandonment in itself that is at all the cause of the constructive total loss. The cause is to be found solely in the two events specified occurring prior to the ship being placed in dock.

For it is scarcely necessary to observe, that there is no such thing as a right in the owners to abandon the ship, and claim as for a total loss, unless there be circumstances occurring during the course of the voyage, which, when the effect of them comes to be known, justify the owners in treating the vessel as a total loss. Accordingly, in the present case, the underwriters tried the question with the owners, whether there were such circumstances in the voyage of the *Laurel*, and in her condition produced by them, as to warrant the abandonment, and render it just and proper, as the jury have found. And it seems to me to follow as a necessary consequence, that in regard to any ulterior question in such a

case between the owners and the underwriters, it is not the time of giving notice of abandonment, or of the claim for a total loss, that is to be looked to, but the time when the circumstances occurred which warrant and justify such abandonment and claim.

There may be abandonment in various circumstances. It may take place upon the capture of the ship by an enemy, or upon an embargo being laid on her by the sovereign power in a foreign port, in both of which cases the issue as to the voyage may stand in a degree of uncertainty. But it has been fully decided that, on receiving information of such an event, the owners are entitled to abandon the ship, with all the chances of her recovery, to the underwriters, and to receive payment of the full sum insured.

[\*847] Abandonment may also take place where the ship is so \*seriously injured by accidents of the sea as to be forced, for the safety of the crew or cargo, to take refuge in some foreign or distant port, and is there found to have sustained such serious damage, that, on due and authentic examination, she is declared to be either incapable of being repaired at all, so as to prosecute the voyage, or to be only capable of being repaired at an expense so great, that it would exceed her value when repaired, or require a detention which would defeat the object of the voyage insured. In such a case it is the duty of the shipmaster to protest regularly for the interest of all concerned, and specially for abandonment to the underwriters; and then to do all in his power, with the best advice and assistance he can obtain, and under the most regular authority he may find in the place, to render the remains of the vessel as available to those having the interest as he possibly can. On information being received of such a state of things, the owners are entitled to give notice of abandonment to the underwriters, if this be done without undue delay, and is ultimately found to be justified by the facts, and therefore to claim as for a total loss.

But abandonment, in the legal sense, does not mean literal desertion of the ship, or even necessarily separation of the master and crew from her. On the contrary, in all the cases which I have mentioned, it is the duty of the master to do all he can reasonably to adhere to the vessel for the interest of the underwriters, and if possible to bring her home to the port of destination. In the contingency of capture there is a chance of recapture; and it so happens, that in the case which touches the present question most closely, that of *Case v. Davidson*, the ship never was deserted by the master, but, on the contrary, after the recapture, was brought home in safety with the cargo, which was the very event which gave rise to the question about freight. In the cases which arose out of the Russian embargo, the same thing took place. The embargo being removed, the ships were brought home by the masters. And, although in the other case of the condemnation of a vessel in a foreign port as being irreparable, the same result cannot take place, the master is not justified in deserting the vessel, but, on the contrary, must do all he can to bring the wreck or remnant of her to the best account.

[\*848] A mistake, in not observing this distinction between abandonment and desertion, seems materially to affect some of the views

taken of the present case, as if there could be no case of abandonment to involve the question as to the right to freight, wherever the notice is given at a time when no desertion of the vessel in the proper sense could take place. I apprehend this to be a misapprehension of the nature of legal abandonment. There may be desertion where no abandonment can occur, as when the crew are forced to leave a ship at sea, and she sinks immediately after. And there may be abandonment receiving full legal effect, where there has been no desertion, as in the cases already stated.

The present case is different in its circumstances from any of these ; but it is the same in principle. It is the case of a ship sustaining great injury at sea, on the voyage insured, but by great exertion of the master and crew, in discharge of their duty, being brought into the port of destination, and there found to be in such a state of wreck as not to be worth repairing, and therefore to be properly abandoned to the underwriters. There can be no doubt, that in such a state of circumstances, the right to abandon and claim total loss is clear. A question may sometimes exist, whether notice of abandonment is strictly necessary to warrant a claim for total loss, as in *Cambridge v. Anderton*, Park, 8th ed. p. 375, where C. J. Abbott put the case as of a vessel reduced to a congeries of planks. But the notice of abandonment, if found to be justified by the facts, ascertains conclusively the right to recover as for a total loss, and fixes also, I apprehend, the claim of the underwriters to the freight, as passing to them with the ship.

It cannot possibly affect this question, whether the circumstances which produce the state of total loss, and warrant abandonment, have taken place at a great distance from the port of discharge, or very near to it. In the case of *Allen, &c. v. Sugrue*, 8 Bar. and Cr. 561, on a time policy, the ship was stranded "at the entrance of the Hull dock." She was valued at £2000 ; and it was proved that it would take £1450 to repair her, and that when repaired she would not have been worth that sum. It was held to be a total loss at the value in the policy. The proximity to port, therefore, does not alter the nature of the case, as a case of total loss by events occurring during the currency of the voyage or risk. [\*849]

The question thus arises, to whom shall the freight belong, where, notwithstanding that the cargo has been delivered in safety, the owners have given notice of abandonment to the underwriters, and are found entitled to payment as for a total loss. It seems to me that the very same principle must apply to such a case, which decides that of abandonment at an earlier period, where events occur which justify that measure before the freight has been actually earned. In abandoning and claiming a total loss, the owners must place the underwriters in the precise position in which they themselves were at the time when the circumstances which have created the constructive total loss took place ; and if the underwriters, compelled to take the wreck at the full value in the policy, are entitled to be placed in all the rights of the owners as at the date of the events which rendered such abandonment competent, the freight at last earned through the exertions of the master and crew,

working, as I apprehend they must be held to be, for behoof of the underwriters, must be considered as so earned for the underwriters, as a part of the proceeds of the vessel or her remains abandoned to them.

The principle of this doctrine, and the distinctions necessary to be attended to in applying it, appear to me to be well laid down and explained by Serjeant Marshall, writing in his third edition, after all the material cases in the English courts had occurred. The important passage is in these words :—"By the abandonment of a ship, according to our law, as I understand it, the insurer becomes the legal assignee and owner, and from that time is liable for all her future outgoings, and consequently entitled to all her future earnings. While any profit can be derived to the insured from the future use of the ship, it cannot be deemed a total loss ; and he can only exercise the right of abandoning upon the presumption in law, that the existing circumstances are equivalent to a total loss. Under such circumstances the owner compels the insurer to purchase the hope of salvage for the full value insured, and thereby puts him into his place for all chances, favourable or otherwise." 2 Marshall, 3d ed., p. 613.

[\*850] \*It has been thought that this is an incautious passage. I humbly think that it is very much otherwise. The author is explaining the difference between the law of England and the law of France upon this subject. By the latter, the underwriters on the ship are entitled to all freight, whether already earned before the circumstances occur which are held to constitute a total loss and to warrant abandonment, or after such events ; whereas, by the law of England, they are only entitled to the freight to be earned posterior to the circumstances which create total loss and lead to abandonment. And it is with direct reference to this important difference, that Mr. Marshall introduces the passage above quoted, in which he means to lay down, and in my apprehension does lay down in very precise terms, the state of the law of England as opposed to that of France. For it is very plain, that there may be a case in which the owners will have a clear right to freight earned, notwithstanding that the ship is ultimately found to be a total loss, either actually or constructively, and in the latter case legally abandoned to the underwriters. For example, there may be freight completely earned on an outward cargo, delivered while the ship is still perfectly safe and entire ; and yet, in the homeward voyage with a new cargo, she may literally become a total loss, or by capture she may be constructively lost ; or she may be a total loss by embargo before sailing on the homeward voyage ; or she may sustain such damage as may amount to a total loss constructively, although she may ultimately be brought into port. In any such cases, there can be no principle of law or equity which should deprive the owners of the freight earned upon the outward voyage ; and at any rate the law of England does not admit any such principle. But the freight which may be ultimately earned by means of the ship, after the occurrence of the circumstances which render her a total loss in law and warrant abandonment, is in a very different situation. According to the doctrine distinctly laid down by Marshall, and further explained by him in the remainder of the para-

graph, that belongs to the underwriters, to whom the ship with all her hazards and defects, and all her advantages, is from that time transferred.

That it is not the date of the notice of abandonment that is \*to be looked to in such a question, is evident from the nature of [\*851] the cases in which abandonment takes place as upon constructive total loss. When a ship is captured by an enemy, though the master may protest for the interest of his owners, no notice can be given to the underwriters, until the owners at home receive information of the event; and though they have a clear right instantly to give notice of abandonment, it may happen that before that notice of abandonment has been given, the ship may, unknown to the owners, have been recaptured, and be proceeding on her voyage to earn the freight. That is nearly the precise case of *Case v. Davidson*, in which all are agreed that the question, as to the right to freight earned posterior to the capture, was first determined on correct principles. Yet it might happen that the ship might be captured while outward bound; upon information of which fact, abandonment and payment as for a total loss might take place; although, in fact, the ship might have been recaptured, the outward voyage completed, and the freight earned, before the date of the notice of such abandonment to the underwriters. In such a case, it is conceived to be clear, that the ship having passed to the underwriters constructively as a total loss, at the date of the capture, the freight would belong to the underwriters.

And so, in the very case now before the court, the owners could not, from the nature of the thing, be in possession of the precise facts concerning the wrecked state of the vessel which have been found to warrant abandonment, until she was actually in dock, and the cargo had been delivered out of her. Nevertheless it is a case of total loss, by perils of the sea previously incurred, and which rendered the abandonment just and proper, as settled by the verdict.

This subject of the right to freight, as between the owners and underwriters, upon abandonment as for constructive total loss, has been somewhat perplexed by the peculiarity of the law of England, in permitting insurance on freight by separate policies from these upon the ship—in this differing from the French law and that of most other countries. The effect has been, in cases of abandonment, to raise difficult questions between the interests of the underwriters on the ship, and those of the underwriters on freight. Such questions arose in the \*cases occasioned by the Russian embargo, 1 Park, 386. I know not whe- [\*852] ther I take a right estimate of those cases. But as far as I can presume to judge, from a view of all the English judgments, as they are fully detailed in 2 Marshall, 3d edit., 614, and in the last edition of Park, I should say, that in the earlier cases, (apart from the special ground of express contract between the owners and the underwriters on freight, on which some or all of them were decided,) the correct principle of judgment, more lately adopted, had not been clearly apprehended. That principle seems to be, that in any question concerning total loss upon the ship, any separate insurance on freight should be regarded as entirely

foreign to the contract of insurance on the ship, as between the owners and the underwriters in such contract.

This seems to be the result of Mr. Marshall's commentary on all those cases. For he goes on, at p. 614, thus,—“The underwriters upon the ship are not bound to take notice of any contract for freight, or the insurance of it, to which they are no parties. They are not obliged to accept a qualified abandonment; and an unqualified abandonment must transfer to them the entire property with all its incidents, and consequently there cannot be an abandonment of the ship and freight to different sets of underwriters.” He plainly approves of the French rule, which does not permit any separate insurance on freight; and he adds,—“And the difficulties which arose in the following cases sufficiently show the inconsistency, not to say the absurdity of the contrary practice, as permitted in this country.” He then goes through the cases originating in the Russian embargo, which were decided on express contract between the underwriters on freight and the owners, without touching the rights of the underwriters on the ship; and then it appears, that in one of the latest of those cases, *Sharp v. Gladstone*, Lord Ellenborough had come to see the right principle for the decision of such questions; having observed, “That after an abandonment of the ship to the underwriters on the ship, he had great difficulty in saying that the assured could abandon the freight, which seemed to follow the property in the ship, being the earnings made by the subsequent use of that which was then become the [\*853] property of others, to another \*set of underwriters; and, as a general question, he desired to be understood as giving no opinion upon it.” But that precise question arose soon after in *Case v. Davidson*, where both sets of underwriters were in the field, and abandonment had been made to each. And Lord Ellenborough then, declaring that the point had been long settled in his mind, with the concurrence of Justice Abbot and Justice Holroyd, (Mr. Justice Bayley, evidently impressed with the old view, dissenting,) decided that the underwriters on the ship had a right to the freight earned after the capture and abandonment, resting his judgment “on this simple ground, that the abandonee of ship has all the rights of the ship-owner cast upon him, by the operation of that emphatic word in the law, ‘merchant abandonment;’ and being so entitled, he has a right, if he use the ship for completing her voyage, to her earnings, as against all the world.” And this he held, although the effect might be, that the underwriter on freight should lose the freight abandoned to him.

The present case is not embarrassed by any such question concerning a separate insurance on freight; because, though there was such an insurance, there could be no abandonment to the underwriters on freight, seeing that the loss was not known till the voyage was completed and the cargo delivered. If it had been otherwise, the underwriters on ship would still have been entitled to the freight; and it would be singular, if, where no such difficulty occurs, and the owners themselves receive the freight, it should not belong to the underwriters on the ship, after the owners have abandoned the ship to them, and have been found entitled to treat her as a total loss.

But, indeed, when the progress and the present state of the law on the subject are rightly understood, the present case is reduced to a very narrow point. If the injury which the vessel received when struck by the iceberg had been thought at the time to be so great as to render it probable that she would become a total loss, and the owners, receiving information of that state of things before the vessel reached Liverpool, had given notice of abandonment; and if, notwithstanding her being ultimately brought into port, the state to which she was reduced had been found to be sufficient to justify that measure; \*there cannot [\*854] be a doubt, upon the authorities, that the underwriters, on paying as for a total loss, would have had right to the freight. Again, if, after the ship had been brought to the neighbourhood of Liverpool, and had sustained a second injury, the owners had had the means of then ascertaining the state of wreck in which she was, without giving up the hope of bringing her into port with the cargo; and if they had then given notice of abandonment, the same result must inevitably have followed. But, as it cannot make the least difference whether the mischief takes place at a great distance, or at a small distance, or very near, or close to the port of discharge, it is plain that, in the actual case which occurred, of the shock of the iceberg and the subsequent grounding outside the dock, if the owners could have had sufficient knowledge of the extent of the injuries to enable them on that day, while she lay on the outside of the dock, to give notice of abandonment, and if that notice had afterwards been found to be right, the freight must unquestionably have belonged to the underwriters. But they could not in the circumstances, possess such knowledge, and they would have exposed themselves to the hazard of such an abandonment being found to be unwarranted, if they had attempted to do so. They, therefore, and their master and crew, only did their duty to all concerned in bringing the vessel into dock, discharging the cargo, protesting in due form, obtaining a survey, and then, when the facts were ascertained, giving the notice of abandonment to the underwriters. This was done without any loss of time. But it is still certain that, by the exertions made both before and after the last occurrence, the vessel, such as it was, was used successfully to the purpose of earning the freight, by saving the cargo and delivering it.

Now, as I understand the matter, it is only because of the recency of the occurrence of the last injury on the outside of the dock, and because, from the nature of the case, the vessel was brought into the dock before any abandonment could with propriety take place, that this case can be said to be at all different from any of those in which the right of the underwriters to the freight would be unquestionable. But to say that, because the freight is actually earned, although after all the \*mischiefs [\*855] within the policy which have rendered the ship a total loss, before it was possible for the owners to abandon, the abandonment, though sustained and found to be just and proper, shall not have the effect of carrying the freight to the underwriters, appears to me to be contrary to the sound principles which have at last been established for the government of all such cases. The owners claim and are to obtain the full value of their ship as a total loss. But in the meantime the freight has been

earned in that voyage, by the events of which, from perils of the sea, the ship has perished constructively, and become the property of the underwriters. I am of opinion, that thereby the vessel stands transferred to the underwriters, with all her defects, but also with all her advantages, as at the moment when the last occurrence, took place, before she came from the voyage into the dock at Liverpool; and therefore that the freight, however it might in fact be received by the owners, belongs of right to the underwriters.

Lords JUSTICE-CLERK, MEDWYN, and ROBERTSON.—We concur in the opinion of Lord Moncrieff.

Lord WOOD.—I have from the first always felt this case to be one attended with difficulty, which has been increased by the consideration of Lord Ivory's opinion. But after giving every attention to all that is there very forcibly stated, I still adhere to the view I originally took of the question at issue, which is most clearly and satisfactorily explained in the opinion of Lord Moncrieff. I continue to think that that view is the sound one, and that the authorities referred to by Lord Moncrieff (to whose opinion I have nothing to add) apply in principle to the circumstances which here present themselves. Having regard to these authorities, I do not find sufficient ground for holding that, in this case, the defenders have not a good claim to a proportion of the freight effeiring to the sums insured by them, and that the freight belongs to the owners of the ship, and not to the underwriters on the ship. On the contrary, I am of opinion that the freight belongs to the underwriters, and that [\*856] they—or at least those of them who are insurers of the ship, and not \*also of the freight—are entitled to credit for a just proportion of the freight, corresponding to the sums contained in the policies effected with them, in settling as for a total loss under the policies.

Lord IVORY.—I am of opinion that, in the circumstances of the present case, the underwriters are not entitled to retain or take credit for any part of the freight, and that, under the verdict, they are bound to settle as for a total loss, leaving the freight to be recovered by the owners.

In order to arrive at this conclusion, it is not necessary to call in question the rule, that abandonment of the ship carries with it, as a necessary and inseparable incident, the freight or other earnings made by use of the ship subsequent to abandonment. So far the parties are themselves agreed. And the point stands definitively settled by the judgment of the English courts in *Davidson v. Case*, which followed a long train of other decisions, all pointing towards the same result; and the authority of which, as equally binding in the Scotch courts, is not to be disputed; seeing, as Lord Eldon has well observed, that, "On a subject of this importance it was impossible to leave the law in such a state, that what was a good decision in the one country should be bad in the other,—where the decisions on this question of mercantile law ought in both countries to be the same." Robertson, Forsyth, & Co., cited 1 Bell's Com. 609.

But it is of importance in applying the rule not to lose sight of the ground on which it rests. And this I collect from the authorities simply to be—"that abandonment is equivalent to a sale of the ship," (per Lord



Tenterden in *Davidson v. Case*)—being “but a different term for assignment, and the same in effect;” (per Dallas, C. J., *Davidson v. Case*)—and therefore, that, as “in every other case of transfer the freight follows the assignment,” so in abandonment, as one of the known forms of assignment, the like result must hold, (per Eund.;)—it being settled law, “that freight follows as an incident the property of the ship,” (per Lord Ellenborough, *Davidson v. Case*,) under whatever mode—of dispositive conveyance or its equivalents—that property itself comes to be passed.

\*The essential characteristic of the rule may, in short, be summed up, as indeed it has frequently been, in a single word, [\*857] —“The freight runs with the ship.” And, consequently, whoever acquires a title to the ship, acquires thereby, as its inseparable concomitant, a title to all freight subsequently earned by the ship; such freight being “derived out of the use of the ship,” which is his property.

Such being the true definition and undoubted principle of the rule, it cannot help suggesting itself at the very starting, that it is inherently, and in its whole nature and essence, rested on technical, rather than upon equitable considerations. It is a rule of conveyancing, not one which has its roots in the proper justice or equities of the case. Its result depends altogether on the legal working of the mere act or instrument by which the ship is transferred, casting perhaps too much aside every consideration but what immediately connects with this exclusive view of the case.

Were the question still open, therefore, or were it expedient in a matter so closely affecting the law-merchant, that this court, as a purely Scots tribunal, exercising a mixed jurisdiction both of law and equity, should, (as in mere competency it might,) proceed to deal with the question upon that footing, without regard to what has been decided in the other end of the island,—I do not know but that, looking to the universal practice, by which separate insurances upon ship and freight (as constituting distinct insurable interests and properties) have so long been recognized and given effect to, the views which, in *Case v. Davidson*, were unsuccessfully contended for by Mr. Justice Bayley, are not the most consonant after all, both with the substantial justice of the case, and the real and understood intentions of the parties. For it does not seem a little inconsistent, to say the least, that a merchant, having a property in his ship to the value, suppose, of £6000—and a separate property in the freight of that ship, to the value, suppose, of £4000 more—shall be encouraged, and at all events permitted by the law, to insure to the full extent of both, as constituting two distinct legal interests, and as such separately insurable—and yet when a total loss of both, in the sense of law, takes place under circumstances which render an abandonment necessary, \*to tell [\*858] him (in case of the vessel’s being subsequently recovered and earning her freight) that he can only recover on the ship, and that he must be an absolute loser to the whole amount of the freight, inasmuch as the legal assignment, operated by the abandonment of the ship, must necessarily carry along with it to the underwriter on the ship the freight as its incident; thus practically forfeiting to him all benefit under his insurance upon freight, though confessedly a lawful insurance,—and

*ipso facto* annihilating, to the extent of £4000, what the law had previously recognized as an undoubted and available property in his person.

As already intimated, however, I do not think that this court ought, or that it can, with any propriety or expediency, now attempt to go back upon the English authorities as ultimately settled in *Davidson v. Case*. But this much, I think, we are entitled and called upon to do—not to extend the operation of the authorities, or give effect to the highly rigorous and technical rule of construction on which they depend,—beyond the strictest limits of the matters actually decided. So far as precisely the same *species facti* may again occur, it will be right to follow what is thus matter of express precedent. But beyond this—where, for instance, there is a material variance in the facts—and more especially where the case cannot be brought within the supposed rule, without operating substantial injustice between the parties, and putting a construction upon their meaning and intent, which, in the circumstances, no reasonable person would believe to be either natural or probable,—the inclination of the court should, it is thought, be rather towards restraining than extending such an authority.

Now, the *species facti* in the present case is, in many respects, and these most material and important, not at all the same as in the English cases.

1. In the outset, I must notice one very striking feature of distinction which has not been touched on in the pleadings, viz., that, as regards certain of the underwriters—who have “agreed that the issue of this cause should be conclusive also with them”—they stand not as insurers of the ship merely, but as insurers also of the freight.

[\*859] \*This is the case—1, with the Scottish Marine Insurance Company, which, besides its insurance on the ship, has also an insurance of £1000 on the freight; and 2, with the Aberdeen Marine Insurance Company, which, besides its insurance on the ship, has, in like manner, a further insurance on the freight for £500.

It is very true, that, neither of these companies being properly parties to the present action, it may not be competent for the court to pronounce a substantive judgment disposing of their case. But, on the other hand, if the court shall be of opinion, that the specialty just adverted to makes a material difference between their situation and that of the Greenock Insurance Company, who alone are in court as defenders, it would seem proper to save their rights in this respect, by inserting some reservation in the judgment; otherwise, under the agreement to hold “the issue of this cause conclusive also with them,” that judgment may be made to carry further than justice or a sound construction would permit.

Be this, however, as it may, just suppose that the Greenock Insurance Company had stood in the same predicament,—as insurers, that is to say, on both ship and freight,—and then observe how, even according to the English authorities, the case would have stood.

The difficulties that could not fail practically to arise from the judgment in *Davidson v. Case*, in the extrication of questions between insurers and insured, where there were separate insurances on ship and freight, were anticipated, and adverted to even in the very act of pronouncing

that judgment; and a method was suggested for obviating them. What was this method? It was just, as in the case supposed, to include ship and freight together as the subject of insurance. "Nor will the decision lead to any difficulty in future," observes Chief-Justice Dallas, "as ship and freight may be made the subject of one and the same insurance." And to the same effect, resuming all the authorities on this head, an American writer, Mr. Benecke, in his *Treatise on the Principles of Indemnity*, p. 57, says,—“that the practice of insuring ship and freight separately is attended with many difficulties; and that the best if not the only way to obviate them, and to put the owner, \*under all circumstances, in the same situation in which he would have been [\*860] in case of a safe arrival, would be, to insure the ship and freight jointly, as one individual risk in the same policy.”

It may, therefore, I think, be assumed, that if, instead of there being separate insurances on ship and freight with different underwriters, the *species facti* in *Davidson v. Case* had been (as to a certain extent it is here) an insurance on both ship and freight with the same underwriters, a directly opposite judgment would have been pronounced. But if so, how very subtle, and altogether technical, does the ground of judgment come to be; and how cautiously and anxiously ought a court to scrutinize the whole particulars of any fresh case, before consenting on such a narrow ground, to defeat what, after all, by the very niceness of the distinctions taken, appears to be recognised as constituting the substantial justice and equity of the question.

2. In the next place, it must be kept in mind that in *Davidson v. Case*, as, indeed, in each and all of the other English authorities, not only was there an express abandonment of the ship, but the *species facti* was such, that, without abandonment, there could have been no claim maintained on the part of the insured as for a total loss. Whereas, in the present question, both parties are agreed that there was, independently of abandonment, what the law of itself would consider and deal with as a total loss; so that, truly the circumstances of the case are such that to entitle the insured to recover, no abandonment at all was required.

Nothing can be more unqualified and express than the language held by the underwriters themselves on this head. They admit generally, “that where a ship is so much injured by perils of the sea as not to be repairable at all, or not repairable without an expense exceeding her value when repaired, the assured may recover for a total loss, without giving notice of abandonment.” Again, with more specific reference to the case in hand, “the defenders adopt the same view with the pursuers as to the letter of the 1st September. They hold, that from the extent of the injury received, as afterwards ascertained by the evidence, no notice of abandonment required \*to be made; that the insured [\*861] might have claimed at any time for a total loss.” And accordingly, the claim for freight is not put upon the abandonment by the owners. It is put, and solely put, “in respect of the claim made by the pursuers for a total loss under the policy.”

I am aware that the jury have found by their verdict, “that the *Laurel* was properly abandoned;” and that consequently it may be said, it is to the

*species facti* so found, and not to the argument of the parties on either side, that the court ought to look. Even in that view it would still be, in my opinion, a most important consideration, whether in the circumstances the abandonment was in itself an essential and necessary proceeding; or whether, on the contrary, the claim of the insured would not, on its own strength otherwise, have stood equally good although there had been no abandonment. But the finding of the jury is not simply that "the Laurel was properly abandoned," but that she was "properly abandoned, and not worth repairing;" or, as it is expressed in another part of the verdict, "that the vessel was a total loss." From all this it is humbly thought the substance and true reading of the verdict really comes to be—not that there was an abandonment in that peculiar sense in which the law insists upon such an act as an essential and indispensable proceeding, and without which no claim, on the part of the insured, would lie—but rather that the vessel had *de facto* sustained such damage as to have become "a total loss," because "not worth repairing,"—a state of matters in which abandonment, in the proper legal sense, was superfluous and unnecessary—thus bringing the case precisely within the category of which *Cambridge v. Anderton*, 2 B. and C. 691; *Allen v. Sugrue*, 8 B. and C. 561; and (still more recently) *Manning v. Irving*, 1 Mann. and Gr. 168, (New Series,) are examples; and the result of which has been to settle that most important rule of law,—that "where the damage sustained makes the loss a total loss, it is unnecessary to give notice of abandonment."—(Per Holroyd, J., in *Cambridge*, *supra*.)

Where both the parties have concurred in putting this construction upon the verdict, and have accordingly conducted their whole argument [862] upon that footing, I should be disposed \*to hesitate before resting the ground of judgment on a different basis. But I will consider the question in both points of view, and, before concluding, deal with the case not only as one in which the claim of the insured is rested on the mere fact of a total loss under the policy without the aid of abandonment, but also as one in which the tender of abandonment made in "the letter of the 1st September," is to be taken as an element.

It is to the first of those points of view that I at present address myself. And assuming, therefore, according to the express admission of the underwriters themselves, that the claim of the insured is to be treated as "not put upon the abandonment," but as resting solely and entirely on the fact of "a total loss under the policy;" in other words, upon the footing that, in point of fact, there was no abandonment, or that, in point of law, none was required, it is impossible, I think, to avoid the force of the following considerations:—

In the first place, the present case comes thus to differ *toto cœlo* from any of those hitherto decided; the English judgments having one and all been pronounced in cases where abandonment was indispensable, and where accordingly there had not only been an express abandonment, but an equally express acceptance of that abandonment.

In the next place, not only is the question, in this view of it, left without precedent, but the very principle on which the English authorities rest, ceases to have application. For what is that principle? It is,

as has been seen, that abandonment is tantamount to a sale or assignment,—that it is an act of transfer operating all the usual effects of a positive deed of conveyance; and that, as every other mode of transfer is available to pass the property of the ship with its incidents, so the law can recognise no distinction in this respect, in the case of a transfer operated by abandonment. But, if such be the principle, how can it possibly be applied to a case which, *ex hypothesi*, is “not put upon abandonment?” If, according to Lord Ellenborough, the law, “rests on this simple ground, that the abandonee of ship has all the rights of the ship-owner cast upon him by the operation of that emphatic word in the law, ‘merchant-abandonment,’” does it not, on the contrary, follow, that so long as there has been no abandonment there can be no abandonee; \*and consequently, that without abandonment there can be no *termini habiles* for that constructive passing of the property, [\*863] which the law has never yet inferred but from the operation of abandonment?

3. But, say the defenders, (still dealing with the question as one in which, as the case is put, there has been no abandonment, in the sense of a technical essential,) “the claim for total loss made by the pursuers implies a transfer to the underwriters of all that remained of the ship, as from the date at which such loss became total; express abandonment having “no effect in transferring the property of the vessel to the insurers beyond what the law would have implied without it, from the claim for total loss being made. What the notice effects in the case of dubious risks, the law itself implies in the case of palpable and unquestionable total loss.”

In the very large sense, and to the extended effect here contended for, there is more than one very serious fallacy involved in these propositions.

It is true that the insured cannot claim for a total loss, any more than he can abandon in cases where abandonment is necessary, without a complete derelinqishment in favour of the underwriter of his proprietary rights in all that remains of his lost or abandoned vessel. He cannot, that is to say, both retain the *ipsum corpus*, or what still exists of it, and at the same time insist for indemnity to the full original value under his insurance, as if no shred of it was yet to the fore. But this goes but a short way to solve the real question at issue.

For (1.) there is a vast distinction, and one clearly recognised in law, between the two cases, where abandonment is necessary, and where it is not; and, as might be presumed, there is not a less strongly marked distinction between the legal consequences of the two cases. “Abandonment,” to use once more Lord Ellenborough’s words, “is no other than the assurer’s election to convert a dubious risk into a total loss. He compels the underwriter, under this disadvantage, to purchase the property for the full value insured, and thereby puts him into his place for all chances favourable or otherwise. The chance of freight is one ground of the calculation made by the assured at the time, in considering whether or not he will \*abandon.” “Nor is it reasonable [\*864] or just that the underwriter on the ship, who, in addition to pay-

ing the full value of it as for a total loss, incurs the expense and risk of all future contingencies and dangers, should not be entitled as well to the earnings of the ship." In other words, wherever the circumstances of the case are such as to call for abandonment, the transaction or contract between the insured and underwriter is one substantially of hazard. It is yet doubtful whether there either has been, or in the event will be a "total loss." The matter is, on both sides, one of "dubious risk." And this "risk" is such as to entitle the insured to throw it over on the underwriter's shoulders, "for all chances, favourable or otherwise." Accordingly, if he do so throw it over, from that moment the property changes hands, and "all future contingencies and dangers" pass with it to the underwriter. But nothing in the least degree approaching in similitude to this occurs, or can occur, upon a claim as for an absolute and known total loss. There is then no longer any "dubious risk" to be "converted" on either side; nor any "future contingencies and dangers," or "chances, favourable or otherwise," to be dealt with. It is not in *forma specifica* as a ship, but as a wreck, expressly admitted or proved to be such, that anything remains. All question as to the vessel's future earnings, whether in the shape of freight or otherwise, is excluded by the very condition of the case as one of "total loss." For as long as "any profit can be derived to the insured from the future use of the ship, it cannot be deemed a total loss; and he can only exercise the right of abandoning upon the presumption in law that the existing circumstances are equivalent to a total loss."

(2.) And so, in like manner, as regards the time when an abandonment must be made—and the time, on the contrary, within which the insured may bring his claim as for a total loss, independently of abandonment—the differences between the two cases are not less important. If he be to abandon he must exercise his privilege "within a reasonable time after he receives intelligence of the accident," Park, 373. In other words, he must at once elect—whether himself to continue proprietor, exposed, as he then must be, to all "chances, favourable or otherwise,"—[\*865] or whether to pass the property \*to the underwriter, on whose shoulders would, in that event, be laid the whole burden of future contingencies and dangers. It is clear that, with reference to such a result, delay would be inequitable. And, accordingly, if the insured neither unduly hang back; or still more, if in the meantime he have taken any tentative measures in the character of a continuing proprietor, e. g., by repairing the vessel, &c., the remedy of abandonment may no longer be competent. It is otherwise with reference to an eventual claim under the policy as for an absolute total loss. For there is no shifting either of the right of property, or its concomitant hazards and contingencies, is contemplated on either side. The insured, on the contrary, by the very fact of his retaining the property, and continuing to take control as owner, gives up, even where the circumstances might otherwise have admitted it, the privilege of abandonment. If in the end the vessel reach her destination, it is her actual state and condition then, without any retrospective reference to the circumstances which at an earlier date might have justified abandonment, that alone must rule.

In a word, the insured must now take his chance of there being but "a partial loss;" as in the meanwhile he must also bear the necessary expenses and other incidents of the voyage. But it may after all turn out that, notwithstanding the vessel's reaching her port and completing her voyage, she shall be found in such a condition as the law will hold to constitute an absolute total loss; and in that case, by force of the ordinary working of the policy, and not at all with reference to any privilege of abandonment, in the technical sense of that term, nor yet to the date of the accident which might have rendered such an abandonment at one time a competent resource, the insured will still be entitled to recover, in respect of the actual condition of his vessel, as shown by the event.

It is in overlooking these, and other equally important distinctions, that the fallacy of the defenders' argument lies. But as to the law of the case there can be no room for hesitation. The whole subject is resolved in the following passage from Mr. Justice Park's work:—"If the assured (not abandoning in time, or not choosing to abandon) prefers the chance of any advantage which may result to him beyond the value insured, \*he is at liberty to do so; but then he must also abide the risk of the arrival of the thing insured in such a state as to entitle him [866] to no more than a partial loss. If, in the event, the loss should become absolute, the underwriter is not less liable on his contract, because the assured has used his own exertions to preserve the thing insured, or has postponed his claim till that event of a total loss has become certain, which was uncertain before," Park, 374.

4. Such being the law, where the case is "not put upon abandonment," and where no abandonment is necessary, it comes next to be considered how the case would stand, taking it into view as the jury have here found, "that the *Laurel* was properly abandoned."

Now, in the first place, it seems to be clear that the mere fact of an abandonment having been made, if in point of law no such abandonment was in the circumstances necessary, cannot by possibility place the insured in a more unfavourable situation than if they had come into court without abandoning. By abandonment they may have gained an additional ground of rantage which they would not otherwise have possessed; but they certainly are not to be held as giving up any right already belonging to them independently of abandonment. Seeing, therefore, the jury have found that the vessel was "not worth repairing," and that *de facto* she had become "a total loss,"—seeing, further, that all the authorities concur in holding this to be a situation in which abandonment was not required,—and seeing, finally, that both the parties have themselves treated the case in argument as one which truly falls within this category—I am satisfied, upon this ground alone, that the very minimum of right to which the insured are here entitled is, that which they would have been entitled to had they come into court without abandoning, and standing merely upon the extent of loss ultimately proved "by the event" to have taken place "under the policy."

In the next place, even assuming an act of abandonment to have been necessary, (which, however, all concerned are agreed it was not,) it is of the last importance to keep in view what was the actual date of that

abandonment, and what the precise state of circumstances in regard to the condition of the vessel \*under which it was made. Now, there [\*867] was here no abandonment but that contained in the letter of 1st September, 1842. And, before that time, not only had the vessel been delivered of her cargo—so that the freight was fully earned, while as yet she was in the unqualified possession and control of the insured—but it was altogether in respect of a survey instituted posterior to the delivery of the cargo, and of discoveries only then made as to the nature and extent of the damage, that abandonment was for the first time thought of. Of course, it was to the condition of the vessel, as absolutely established and shown from the event to exist at this particular time, and not to anything in the vessel's previous history or condition, that such an abandonment had reference; and so far, therefore, as a legal transfer of the property of the ship is to be held as having been effected by means of it, it appears to me very plain, that, neither in the intention of the insured, nor upon any conceivable view, whether in law or in equity, of the circumstances connected with the abandonment, can any other date be assigned to the transfer thus effected, but that which was the actual date of the proceeding of abandonment itself.

The defenders contend, however, that, whether the case fall to be settled as a constructive total loss on the footing of abandonment, or as an absolute total loss on the footing that the event has actually established it to be so, a retrospective effect must be given to the transaction, and the property of the ship held to have passed from the insured to the underwriter, as from the moment in which she received her injury.

And, in the case of abandonment, there may perhaps, in particular cases, and to a certain modified extent, be ground for attributing to it a retrospective operation, but assuredly not at all in the sense, nor yet in the measure and degree, for which the defenders argue. The truth of the matter seems to lie here, that inasmuch as abandonment, where it is essential to recovery as for a constructive total loss, falls to be made (if to be made at all) “within a reasonable time of receiving intelligence of the accident,” and while as yet both parties are so far uncertain of what may be the actual event, the transaction between them having to be concluded on the footing of “a dubious risk,” it will naturally come to [\*868] be a characteristic \*of such a transaction, that the transfer of property thereby operated should have relation to the state and condition of the ship, as to be gathered from the intelligence, in respect of which alone the insured is entitled at all to proceed. The abandonment is in such a case the sale of an unknown hazard. And it is of course, implied in this that the seller put the purchaser in his full room and place as regards the subject of sale, such as that subject of sale was known, or supposed to have existed, at the particular point of time from which both parties assume that the hazard is to run. The sale in such a case is not a sale *de presenti*. It is a sale of that which was known at a particular time to have been in peril, and supposed at the instant of abandonment to continue a “dubious risk.” Of course, a transaction of this description could not fail to have a retrospect. But it has a retrospect no otherwise than an express and positive conveyance of the ship would



also have had, supposing the ship to have been at sea, and under hazard at the date of sale, and the vendition to carry right to her, such as she was last heard of.

In another respect also, the transaction, in this aspect of it, may perhaps, without impropriety, be said to have a retrospect. For, inasmuch as the growing freight of the voyage insured would only, according to our law, be definitively earned in case of the vessel's completing her voyage, when, as well that portion of it which corresponds to the time anterior, as that which relates to the time posterior to the transfer, would come to be exigible, the underwriter, in his character of purchaser of the ship, would, in the event of the vessel's ultimate safety, have a retrospective right even to the earlier portion of the freight, as an incident which had all along "run with the ship."

Accordingly, all this, when applied to the case of a ship abandoned, while either under capture or embargo, or while labouring under any other form of uncertain and dubious disability which entitles to the privilege of abandonment, is no more than what a clear and substantial equity requires. For, as it is the assumed condition of the vessel at the particular period, on which the right of abandonment itself depends, so is it the vessel, with reference to the condition so assumed, and \*with "all the chances, favourable or otherwise," arising out of [\*869] that condition, as the same shall come to be modified by the event, which the abandonment, and the sale or assignment which it implies, are calculated and understood to carry.

In no other sense am I able to read the authorities on which so much reliance has been placed by the defenders, as affording countenance or support to the notion of a retrospect, even with reference to the case of proper abandonment, and where such an abandonment is absolutely essential to the validity of the insured's claim, as for a constructive total loss.

But in a case like the present, where any abandonment that was made had reference, not to any dubious or uncertain condition of the vessel at a distant period, but to its known and proved condition as established by actual survey on the spot, and with reference to the very time of abandonment itself; and where the object was not to transfer and make over to the underwriters "a dubious risk," with its uncertain incidents and contingencies, but to place in their hands the ship, or rather its wreck, such as it actually and at the moment existed, I can see no room whatever for letting in the principle of a retrospect. And of course, *a fortiori*, must I come to this conclusion, upon the state of the argument as it has been conducted on both sides; the whole of that argument assuming that judgment falls to be pronounced, just as if there had been no abandonment whatever, and it being admitted that abandonment was in the circumstances unnecessary, and a settlement being accordingly demanded, upon the footing not of a mere constructive, but of an absolute total loss, as demonstrated by the final event.

In the first place, the vessel had never, either in property or control, been out of the hands of the original owners, down to the very moment of their insisting in their claim.

Moreover, down to the same moment the whole hazards, and contin-

gencies, and dangers, and expenses of the voyage, had also been exclusively with the owners. No "risk," dubious or otherwise, had, up to that moment, been compulsorily made the subject of sale or transfer to the underwriters. The contract of insurance had been allowed to remain operative in its own strength, and without the slightest change, or attempt at change, \*from first to last,—the underwriter being exposed to [\*870] no "chances, favourable or otherwise," beyond what that contract, in the most direct and express terms, had from the very first cast upon him.

In such circumstances, all that the underwriter can, in my humble opinion, be entitled to, is to be satisfied, 1. That the loss for which a claim is now at last made upon him, was a loss truly incurred under the perils and during the currency of the policy; and, 2. That it is such as, in point of extent, to constitute what the law holds, and gives effect to as a total loss.

If these two conditions be answered, the underwriter is really straining after an undue advantage, when he insists on the freight which the vessel had in the meanwhile earned before it could by possibility be ascertained what was either the nature or extent of the claim to be set up under the policy. In the case of abandonment proper, the freight is given to the underwriter only because the vessel that earns it is made, by force of the abandonment, his vessel; and because, by the chances and contingencies thrown upon him by the abandonment, a correspondent burden has been imposed upon him as owner. But nothing of that sort occurs here. On the contrary, it might have happened that the insured, even after the freight was earned, were entitled to recover only as for a partial loss. They have run this risk, which, of course, they could not have done but as owners. And how, then, is this state of ownership in their persons, and the important rights consequent upon it, to be taken from them? It cannot surely be held to subsist in them to one effect, and in the underwriters to another. It cannot, that is to say, subsist in the insured as regards the ship, to the effect of exposing them to the unfavourable chance of having to settle as for a partial loss, had the event so turned out; and at the same moment subsist also in the underwriters as regards the freight, as if, even while the ship was still, to the above effect, at the hazard of the insured, the underwriters, and not the insured, were its real owners. "The chance of freight," as observed by Lord Ellenborough, "is one ground of the calculation made by the assured at the time in considering whether or not he will abandon;" but what does he gain by not abandoning, if, notwithstanding his abstaining from doing \*so, the underwriters shall still be entitled to the [\*871] freight thus taken into calculation, in every case where a claim comes eventually, and in the end, to be made as for a total loss? The authority of Mr. Justice Park is on this head expressly against the defenders. "If the assured prefers the chance of any advantage which may result to him beyond the value insured, he is at liberty to do so," viz., by not abandoning. But does he forfeit the advantage thus earned, if after all there shall turn out to be a total loss? Quite the contrary. The only hazard he runs is, 1st, the forfeiture of his right to abandon;

and 2d, "the risk of the arrival of the thing insured in such a state as to entitle him to no more than a partial loss." But still, "if in the event the loss should become absolute, the underwriter is not the less liable upon his contract," for the total amount of such loss; while as to any lesser advantage which may in the meantime have accrued to the insured, it must remain with him as having still been, at the time of its accruing, the undoubted owner of the vessel, through the use of which it at his risk accrued.

Accordingly, let it be supposed (and the supposition is one as favourable for the defenders as can well be made) that the vessel here had sustained no injury but what it received from the iceberg—and that the owners, having received intelligence of the accident, resolved not to abandon—and that the voyage home was accordingly completed at their expense and risk—and that the cargo was delivered and the freight earned, without any further cause of loss having occurred. It is clear from the authorities, as well as on principle,—1st, That the owners would, in this state of matters, have forfeited all right of proper abandonment, as having kept the "chances, favourable or otherwise," to themselves, instead of putting the underwriters *tempestivè* in their place, thereby "converting" what at first was but a "dubious risk" into a "total loss;" 2d, That they must therefore have settled as for a partial loss only, if such, "in the event," was the character and extent of the damage actually sustained; 3d, But it by no means follows from this, that if "in the event" they could show the damage did actually extend beyond a partial loss, and did actually amount to what the law considers and gives effect to as a total loss, they would \*not have been entitled to recover as for that total loss. On the contrary, that they were so entitled to [\*872] recover, is past all reach of contradiction. And hence, 4th, As it is with reference to the actual event that this loss would have fallen to be estimated, so is it also with reference to the date when that event was ascertained, that the corresponding settlement of the loss would fall to be made. Before that date they had not put, and were not entitled to put, the underwriters in their place either for good or evil. And consequently it could only be as from that date that the underwriters, by being then for the first time put in their place, are to be considered as becoming proprietors of the wreck, or as an incident to it, of its chances thenceforward, "favourable or otherwise."

5. It only remains to observe, that I am by no means satisfied, even on the defenders' own principle of a retrospect, that in the circumstances of the present case they would be entitled to demand the freight as an incident to the vessel.

For it is of importance to keep in view, that, as on the one hand the underwriter, even in the case of abandonment, "does not become privy by virtue of such abandonment to any existing charter party, nor perhaps to any contract of affreightment before made with the owner," (per Lord Ellenborough, C. J., in *Case v. Davidson*),—and hence "is not bound to complete the voyage, because the rights of the owners of the goods laden on board are personal, lying in contract with the ship-owner, and not running with the ship," (per Holroyd, J., *Case v. Davidson*),—

so, on the other hand, it is the privilege and the right of the ship-owners to take into their own hands the duty of forwarding the cargo, and to prevent the underwriters and all others from interfering with it, in order that they may thereby complete the earning of their freight.

This doctrine is in express terms laid down in an American treatise on Insurance, 2 Phillips, 463, and our own law is, as I understand, to the like effect. The words are—"The insurer is not entitled in consequence of the abandonment to an assignment of the charter party from the assured. If the assured transships the goods, and completes the earning of the freight, the insurer, to whom the original ship is abandoned, has no right to object."

[\*873] \*Accordingly, if, after collision with the iceberg, the vessel had here been forced to run (suppose for repairs) to some intermediate port, and if in that port she had, just as at Liverpool, sustained further injury, by grounding and heeling over, while the cargo was still on board, no one can doubt, that it would, in such a case, have been the privilege and duty of the master, as representing not the underwriters but his owners, to transship the cargo into another vessel, and so, having forwarded it to its port of destination, to earn, not for the underwriters, but for his owners, the freight stipulated in the personal contract subsisting between them and the parties to whom the cargo belonged.

Nor would this proceeding on the part of the master have prevented the insured owners from still insisting in a claim for a total loss upon the ship, if, upon investigation and survey, such turned out to be the result. On the contrary, the owners would, in the case supposed, have been entitled not only to recover as for a total loss upon their vessel, but also to uplift the freight of her cargo, as unquestionably earned by themselves. Neither would it in the least have altered the rights of the parties, though the vessel, after receiving her death-blow, had perhaps to be towed into a different position (whether in the harbour or its neighbourhood) with the cargo still on board. The right to take charge of the cargo, and if necessary to transship and forward it, would still have belonged to the ship-owners, and not to the underwriters. And the latter could in no case have insisted on being put in possession of the cargo, merely in order that the freight, which might eventually be earned by forwarding the same, should accrue to themselves.

But the case, as it actually happened in the present question, does in no material respect differ from that which has just been supposed. And if the vessel upon taking the ground had altogether gone to pieces, and it had been necessary in this situation either to deliver the cargo from the wreck, or to collect it again together if scattered and floating about in the sea, it cannot, I think, be doubted, that the right to take possession of it, and to use all necessary means for its salvage, would have belonged to the owners of the vessel, and not to the underwriters. Nor, [\*874] if it had been necessary, in order to save both \*wreck and cargo, to carry the whole to a different position, in point of locality, from that where the accident happened, could that in principle have made any difference. Yet what did the scuttling of the waterlogged vessel in the first instance, and the plugging her up again more tightly at ebb, so as

to secure her better floatage on return of the tide, and the carrying her afterwards into dock, here amount to, but to a proceeding of this kind? It was a measure for the mutual benefit of all concerned, but which did not alter or weaken the rights of any. It was a case of salvage of wreck, not a case of completion of voyage in the only proper sense of that term in which the contract of affreightment is concerned. In point of fact it is, in the circumstances of the present case, almost a perversion of language, to speak of the ship as having here carried on the cargo to its ultimate destination. It was in truth the cargo which saved and carried forward the ship. And had the cargo been anything else than a cargo of timber, it is clear that neither ship nor cargo would ever have reached their destination.

Upon the whole matter, therefore, I have formed a very decided opinion in favour of the insured, and against the underwriters. It appears to me against all equity, as well as against all law, that the former should be deprived of their freight. If vessel and cargo had been lost at sea, the insured would have been entitled to recover both on the ship and freight, under their several policies. If vessel and cargo had both come safe to land, the insured would still have been preserved *indemnes* as to both, by the possession of an existing ship, and payment of the freight she had earned. Why should it then be otherwise as the case stands? Had abandonment been legally necessary, and had there accordingly been a transfer of the ship by abandonment, of a date, and under circumstances entitling the underwriters to her freight as afterwards earned, the rigorous technical grounds on which the English authorities rest might possibly have compelled such a result, however unreasonable otherwise on ordinary principles. But there was no abandonment, and consequently no transfer here, until after the cargo was delivered, and the freight completely earned. The case, indeed, as put by the parties themselves in argument, is <sup>\*</sup>one, not so much of abandonment at all, in the proper technical sense of that word, as of an absolute total loss [\*875] sought to be recovered independently of abandonment, and simply under the stipulations of the contract of insurance. It is said the contract of insurance is a contract of indemnity. Let effect then be given to it as such. But do not let it be forgotten that the indemnity which insurance has in view is an indemnity (to use the words of an authority already quoted) which shall "put the owner, under all circumstances, in the same situation in which he would have been in case of a safe arrival." Now, here, if the underwriter shall be allowed to seize the freight, the insured, who, "in case of a safe arrival," would have had both their ship and freight, will be totally deprived of the latter, and will thereby, after incurring all the expense of insuring it as a separate property, sustain a loss (from which a safe arrival would have freed them) to the amount of £1402, 2s. 2d.

Lords CUNINGHAME and MURRAY, returned opinions to the effect that the insurers had no claim to the freight.

The case was this day finally advised.

LORD PRESIDENT.—Having, after deliberate consideration of the whole circumstances of the question reserved for the determination of the court

on the face of the verdict in this case, on a former advising, delivered a full opinion concurring in the result of that pronounced by Lord Moncrieff, and the majority of the consulted judges, and which, as already accessible to the reporters, I deem it unnecessary to repeat, I have now only to add, that while I admit that the question is very far from being free from difficulties, and am far from denying weight to the elaborate opinion of Lord Ivory, I must continue to hold that the defenders now before us are entitled to a proportional part of the freight due on account of the ship *Laurel*, upon which the claim of her owners has been sustained as for a total loss.

Lord MACKENZIE also retained his former opinion.

[\*876] Lord FULLERTON.—When the case was formerly before us, \*I was of opinion that the claim of the underwriters could not be sustained. I remain of the same opinion. Indeed, all that I have since heard, and in particular the considerations urged by the minority of the consulted judges, have tended to confirm my original impression. After the very full discussion of which this case has been the subject, it is not my intention to enter into details. I shall content myself with stating generally the grounds of my opinion.

The question is, Whether the underwriters have a right to the freight? And their claim is rested on the general rule that when a ship is abandoned the current freight is transferred as an accessory with the property of the vessel. There is no doubt about the general rule. The only difficulty lies in its application to so very peculiar a case as the present. And it is indispensable to attend to those peculiarities, otherwise there will be great danger of the misapplication instead of the application of the rule.

In this case, the ship had arrived with its cargo at Liverpool, the place of its destination. It was taken into dock, and the cargo discharged. The freight was thus completely earned. After it was so earned the ship was taken into the graving-dock, and on a survey of the damage which it had sustained on the voyage, intimation was made to the underwriters on 1st September (for there is no dispute about the date) of the total loss, accompanied with a tender of abandonment. That tender was refused, on the ground that the loss was not total.

The owners then brought their action, not founded merely on the abandonment, but on the tender of abandonment, its rejection, and the existing total loss of the ship.

No question of abandonment was raised in the issue, the question put to the jury was, whether there was or was not a total loss of the ship? The verdict was to the effect, that as the vessel was not worth repairing there consequently had been a total loss at the time when the tender of abandonment was made; and the point now in dispute is, the legal effect of the tender of abandonment in such circumstances on the right to the freight.

In order to raise the question, divested of one specialty, which I shall afterwards consider, let it be supposed that here \*the tender had  
[\*877] not only been made by the owners on the 1st September, but had been on the same day accepted by the underwriters. The question then

would have been, Did that completed abandonment, that absolute transference of the vessel or its remains, on the 1st September, carry anything but the vessel in its existing state, or did it include the freight, which had been completely earned before that transference?

Now, for the reasons assigned by the minority of the consulted judges, in which I in general concur, I must withhold my assent from the latter proposition. It is so startling in itself that it would require clear authority to support it, and I can see none. The various *dicta* and decisions quoted on the part of the underwriters give no countenance to the notion, that an abandonment, whensoever made, carries retrospectively the whole freight which may have been earned in the course of the voyage, during which the damage occasioning the abandonment has been sustained. On the contrary, I think it clear, from the principles of those very decisions, that, supposing freight to have been completely earned before the abandonment, for instance, by the transport of goods to an intermediate port, touched at in the course of the voyage, and where no loss had been incurred, that freight would not be carried to the underwriters by the subsequent abandonment of the ship. For the principle is, that the abandonment operates as a sale or assignment of the vessel; and as, in our practice, there is no division or appropriation of freight, *pro ratâ itineris*, the abandonment carries, as the assignment would have done, all freight subsequently earned, or, to speak more correctly, all the freight in the course of being earned at its date.

But where is there any authority for holding that either abandonment or assignment carries freight completely earned, while the vessel was still unassigned, and remained the property of the original owners? There is none, except perhaps the single expression of an opinion of Mr. Phillips, as to which I concur in the explanation given by Lord Jeffrey. I do not think it was intended to apply to such a case as this; and, at any rate, it stands alone, unsupported by any other authority and by any decided case.

But if there be no express authority for such retrospective operation \*of "abandonment," it certainly derives no support from its intrinsic equity; and seems, besides, as I have already observed, [\*878] utterly at variance with the principles on which the whole train of cases on the effect of abandonment have been decided.

One retrospective effect, indeed, abandonment in certain circumstances may have. It is that noticed in the opinions of some of the judges who have preceded me. In the case of the abandonment of a ship still on her voyage, and at a distance both from owners and underwriters, an abandonment made, on information received by the owners of the state of the vessel, may, by fair implication, carry the right, not merely from the date of the abandonment, but from the date of the information concerning the state of the vessel. Such abandonment may be fairly held to imply an offer to surrender the ship as she stood, according to the latest information held by the owners, and from the date of such information.

But there is no room for any retrospective operation of that kind here. For here, at the date of the abandonment, the vessel was in the graving-

dock at Liverpool, and the owners on the spot. So that the abandonment could imply nothing more than was expressed, viz., the surrender of the vessel, or rather its wreck, as it lay at that moment in the graving-dock.

The retrospective operation contended for by the underwriters here is one of a totally different kind. In so far as I understand it, it rests on the assumption that abandonment takes effect, not from its date, or even from the date of the information conveyed to the owners, but from the date of the damage which gave occasion to it.

Now, in the first place, I see no authority for such a proposition ; and, indeed, it is at variance with the general rule that, though an owner may, he is not obliged to abandon. Secondly, even where an actual abandonment is the condition of and preliminary to a claim of total loss, the owner certainly never can be called upon to abandon, or can be held to have improperly delayed to abandon, if he does so as soon as he obtains the information of the loss. And here there can be no doubt that the owners were perfectly in *bona fide*, as they abandoned the very moment [\*879] they ascertained the exact state \*of the ship, of which, until the survey in the graving dock, they had no precise information. Thirdly, and lastly, any supposed undue delay of abandonment is here totally out of the case ; because, even after the tender of abandonment, the underwriters refused to accept it ; in other words, maintained, even down to the verdict of the jury, that there was no total loss, and that the ship ought not to have been abandoned at all.

It does appear to me, then, that in this case, and even supposing that the tender of abandonment had been actually accepted, there could have been no ground in law or in equity for giving that abandonment any retrospective effect, so as to convey to the underwriters the right to freight which had been confessedly earned before the abandonment took place.

But the last consideration above alluded to leads me to notice that peculiarity of the present case which distinguishes it from all those referred to in argument. In all those cases the tender of abandonment had not only been made by the insured, but had been accepted by the underwriters ; the loss had been paid, and the transaction, involving the transfer of the ship and its accessories, was completed.

But in this case the tender was not accepted at the time, nay, it never was accepted by the underwriters at all. Now, what authority is there for holding that a tender of abandonment, absolutely refused by the underwriters can have any retrospective effect, is to operate even from the date of the tender, when the owner is found entitled ultimately to put his case, not on the voluntary act of abandonment, but on the total loss, irrespective of the abandonment ?

For it appears to me that abandonment is of two kinds. One is the voluntary act of the owner, who, in certain circumstances, in themselves not absolutely conclusive of the total loss of the vessel, avails himself of a right recognised by the law of insurance to deal with a dubious case of loss as one certain. In that case abandonment is indispensable ; nay, it is the foundation of the claim of total loss, which, but for the act of



abandonment, could not emerge till the fate of the thing insured was ascertained.

But there is another kind of abandonment, viz., that which emerges on a loss which, though in one sense total, i. e., destructive \*of [880] the thing insured, in the character forming the subject of insurance, yet leaves something extant, in itself a subject of value. Thus, for instance, a ship may be dashed to pieces, while its materials, or a great part of them, are recoverable; or, as in the case which exists here, a ship may be so materially damaged that she will not, if repaired, be worth the cost of the repairs, in which circumstances, she is justly considered as no longer a ship, but merely, as expressed in one of the English cases, a congeries of planks, a mass of materials, of which the casual cohesion forms no addition to, but rather a deduction from their value. In all such cases the loss of the ship is, and justly, considered total; and a claim on that ground is good, though that claim necessarily draws after it, or rather involves in itself, the surrender of the remains of the thing insured to the underwriters. There is, consequently, an abandonment in this case as well as the other; but they differ in one essential particular. In the one, that of mere dubious or *prima facie* loss, the voluntary act of abandonment by the insured forms the ground or condition of the claim for total loss; in the other, on the contrary, it is the claim for total loss which involves the consequence of the abandonment of any of the extant elements of the thing insured.

Now, it does appear to me, that with regard to the first kind of abandonment, it would require the acceptance of the underwriter to enable him to found upon it; and that if he rejects it, and ultimately a total loss is established, he can take nothing by the tender of abandonment on the part of the owner, but must be satisfied with the effects of the abandonment of the second kind, namely, the abandonment of the materials as they stood at the time when the total loss was ascertained and claimed. It is in this sense that I am rather disposed to adopt the view taken in the opinions of some of the consulted judges, that this is not a case of abandonment in the proper sense of the term,—that is, of the voluntary act of the owners transferring the ship, while yet understood to be, by possibility, a ship; but a case of total loss, and the consequent surrender merely of the materials of the ship, as they stood after the total loss had been ascertained.

And I do not think that there is anything in the verdict of the jury \*inconsistent with this view. They were asked whether the [881] vessel in consequence of damage received during the voyage “became a wreck, and was totally lost?” They answer this question in the affirmative, by finding for the pursuer; and they assign as their reason “that the *Laurel* was properly abandoned, and not worth repairing.” The meaning of this I consider to be clear. The jury were never asked to find, and certainly could not mean to find, anything regarding an abandonment in the proper sense of the term, namely, as implying a transaction between the underwriters and the insured irrespectively of the state of the vessel. Considering the question put to them in the issue, their verdict can bear no other construction than the answer

that there was here a total loss, and consequently that the abandonment of the materials was properly made; while, as the defence maintained by the underwriters was, that they were justified in denying the total loss, and in refusing the abandonment, the verdict must, in the circumstances of the case, be held as equivalent, or necessarily involves the proposition, that it had been improperly rejected.

All that I infer from this is, that the verdict, which is in all respects a verdict against the underwriters, cannot be founded on by them as giving them any right which they otherwise would not have held. They denied that there had been a total loss. The jury found the reverse, and consequently the only kind of abandonment which they can plead is, that, not precedent to, but following upon, the claim for total loss—an abandonment not depending on any tender of the owners accepted by the underwriters, but resting merely on the obligation of the owners to give up, on the ascertainment and claim of total loss, anything which might remain of the thing destroyed. Now, none of the authorities referred to, touch a case of this kind, nor can I see how it is possible that an abandonment of this latter kind can have any retrospective operation whatever. It is the result, not of any transaction between the parties, but of a right held by the underwriters to anything which may remain, when the total loss is claimed and established against them. It is from its nature no transference of anything but the remains of the vessel, as [\*882] affording to the underwriters, to \*the extent of the value of those materials, the means of defraying the loss which they are obliged to make good. The difference between the results of the two kinds of abandonment to which I have alluded, may be exemplified by a slight alteration of the circumstances of this case. Just let it be supposed, that while the water-logged vessel was working her way up the Mersey, the owners, either from her appearance, or even from inquiries made on going aboard, suspected that she might prove a total loss, and had tendered abandonment to the underwriters, I think it is clear, from the various cases referred to, and the principles there laid down, that if the tender of abandonment had been accepted, the transaction would have been complete, the transference of the vessel would have been effected, and the freight current, and not yet earned, would have been carried to the underwriters. But, let it be supposed that, as in the present case, the tender of abandonment had been rejected; that the vessel had consequently remained in the custody of the owners; and that by their exertions, or that of the master as still acting for them, the vessel had been kept afloat till she arrived at Liverpool; that the cargo had been discharged, and consequently the freight earned; and that, upon being got into the graving-dock, that which had been doubtful before, namely, the total loss of the vessel, had then been for the first time ascertained, and a claim for total loss made, implying, of course by the operation of the law itself, an abandonment of the timbers of which it was composed. Could, in such a case, that abandonment, whether express or implied, carry anything but the timbers as they then stood? Or could the underwriters have been entitled to give it a retrospective effect, by combining it with the previous tender of abandonment, which they had absolutely

rejected? I cannot conceive that such an attempt would have been successful, because it involves a violation of the best understood rules of mutual contract. In so far as anything rests on the act of the insured, irrespectively of the actual ascertained state of the ship, that tender is but an offer, which, if rejected, cannot carry any right to those by whom it is rejected; and the circumstance of its having been made, cannot debar the parties making it from enforcing any right which they are ultimately found to have, \*independently of any offer whatever [\*883] on their part, or acceptance on the other side.

Now, the present case is much stronger, because here there was no tender of abandonment until after the loss had been actually ascertained. That, though in form a tender, was truly nothing but that tender which the law would have implied even had it not been made. But at any rate, even viewing it as a tender, still, as it was not accepted, it of itself can carry no right whatever to the underwriters. They must stand exactly in the same situation as if such tender had not been made, and only left to be implied on the ascertainment of the total loss, and the claim of that total loss against the underwriters.

Viewing this, then, as a case not of abandonment by the voluntary act of the underwriters, but of a claim for total loss on the ascertainment of that loss, and the abandonment incident to such ascertainment by the operation of law, I do not think that this is a case in which the abandonment can have any retrospective operation whatever. But I come to the same conclusion on the different view, and on the grounds already explained; because, even supposing this to be treated as a case of abandonment by the voluntary act of the owners, such abandonment being made after the freight was earned, but still as soon as the owners, acting in perfect good faith, were made aware of the true state of the vessel, could carry nothing but the remains of the vessel, as they lay at the time of the abandonment, with which remains the cargo had no longer any connexion, either actual or constructive, and to which, therefore, the freight could not be an accessory.

I concur, then, in the opinion of the minority of the consulted judges, that the claim of the underwriters ought not to be sustained.

Lord JEFFREY.—Although I must dissent from the judgment which is now to be given, I do not think it necessary, after all that has been said by the other judges, to go at large into the grounds of my opinion. I may say, in general, that it coincides with that of Lord Ivory—with the whole doctrines laid down in which I indeed entirely concur.

\*At the same time, I hesitate a little about the competency of applying to this particular case that large part of these doctrines [\*884] which relates to the right of claiming for a total loss without any previous tender of abandonment. I quite agree that this was a case in which no abandonment was necessary; and that the owners, if they had so elected, might have recovered as for a total loss without any such tender. But when we find that, in point of fact, they did elect to abandon, and when their tender to this effect was rejected, proceeded to sue on the policy, on the precise ground of that abandonment, and of its being justified by the circumstances in which it was made; and, above all, when

we find that the leading and governing finding of the verdict is, "that the vessel was properly abandoned," (the subsequent or additional finding that there had been a total loss being obviously a mere statement of the fact which justified the abandonment,) I have difficulty in holding that we are now at liberty to disregard this state of the record, or to deal with the case as other than a case of abandonment, and to be disposed of according to the principles of law properly applicable to such a case. Upon these principles, however, I have come to be satisfied that the claim of the owners is well founded, and, in truth, as clearly maintainable as if it had rested, without any abandonment, on the substantial fact, (also found by the jury,) that the vessel had become a total loss during the currency of the policy, although not known to have been so till after the freight had been earned. In the little I have now to say, therefore, I shall confine myself strictly to the law of abandonment.

We are all agreed, I think, as to the general grounds and effects of that law. The leading point is, and there is no dispute in regard to it, that abandonment is equivalent to sale or assignment; that it transfers the property of the vessel; and consequently entitles the new proprietors to all freights current or earned subsequent to this transfer. In truth and reality, therefore, the whole controversy is as to the period from which this transfer should be held to be effected. A very narrow point undoubtedly; and yet all that is truly involved in the case now before us, and capable, on my view of it at least, of a very simple and easy solution.

[\*885] \*Though it is undoubtedly by the owners' voluntary act of abandonment alone that the property is in such cases transferred, I am perfectly aware that the transference can scarcely ever be held to be only of the date of the actual intimation or offer to abandon; and that it must almost invariably be admitted to take effect, and to pass the property, from a considerably earlier period. But this obviously arises solely from the fact that neither owners nor underwriters are usually with the ship at the time the calamity occurs, by which alone abandonment can be justified, and that some time must therefore necessarily elapse before they can act upon the intelligence of that calamity. It is from the time of receiving such intelligence, therefore, that the right to abandon, and the duty of timeously intimating such abandonment, is necessarily reckoned, while the effect is to transfer the property, as from the time when the intelligence was, or might have been sent off by those present with, and in actual charge of the vessel; or in other words, as correctly stated by Lord Ivory, to make her over to the underwriters, "as she was last heard of."

I admit, too, that in most cases this will be equivalent to holding the transference as completed at the actual occurrence of the accident, on the intelligence of which it became the right of the owner to abandon, and his duty to do so without delay; because it will generally happen that the nature and extent of the disaster is apparent from the beginning. But this is by no means always the case; and it is from the undue extension (as it appears to me) of a rule which may be generally applicable to cases

not truly within its principle, that what I humbly conceive to be the erroneous views of the present question have proceeded.

The points I make, in short are these :—1st, That no abandonment can ever be legally or effectually made till the owner is in the knowledge of such facts in the condition of his ship as entitle him to make it ; 2d, That he may always abandon within a reasonable time of his coming to such knowledge ; and 3d, That the property, with all its burdens and advantages, is only transferred to the underwriters as at the time when those actually with the ship must have been in the knowledge of this being her condition. In one word, the right accrues, in the \*case of an ultimate abandonment, not from the time when that by [\*886] which it is justified may, in point of fact, have actually happened to the vessel, though unknown to those in charge of her, but only from the time when it did, or could become known to them. In the present case, even holding that the vessel had actually received her death-blow on her encounter with the iceberg, (a supposition more favourable for the underwriters than they are entitled to under the verdict,) I hold it to be manifest that no facts of this description did or could have come to the knowledge of the owners till after she had delivered her cargo, and was inspected and reported on in the dock at Liverpool ; and that the property could not, therefore, have been transferred to the underwriters till after the freight had been earned.

As to the matter of fact, that the owners did not, and could not know at any earlier period, that their ship was in a condition to justify abandonment, and that they did not, therefore, improperly delay to notify their purpose of abandonment, I take it to be conclusively settled by two facts appearing on the face of the record ; 1st, That it is finally fixed by the express terms of the verdict, “ that the abandonment was properly made,” which could not possibly be if it had been fraudulently or collusively delayed ; and 2d, That even after this inspection and report, the underwriters maintained that there was no such damage even then as to warrant that abandonment, and actually went to the jury upon that issue.

As to the law applicable to such facts, I have already stated, generally, what I conceive to be its results, and shall add but one or two explanatory observations. It must always be kept in mind, as the basis of the whole, that abandonment is a voluntary act of the owner, and that until he choose to perform it, the property of the ship must remain exclusively with him. When he does perform it, the property no doubt is transferred, and where the parties are at a distance from the actual locality of the ship, that transference will draw back to the time when those actually with her must have been aware of the circumstances which warranted it, and transmitted the intelligence on the strength of which it was afterwards made. But to bring more clearly out that there are no grounds for giving this passing \*of the property any larger retro-spect, I shall now beg leave to suppose that both owners and [\*887] underwriters happened to be actually aboard of the vessel when that occurred to her which was ultimately found to be a good ground for abandonment. In that case, the right and duty of the owner, and the actual transference of the property from him to the insurers, would all

emerge and take place at the moment, and without any retrospect whatever and it is worth while, therefore, to consider how the property of the vessel would in such a case be affected.

Whenever its visible and known condition was such as plainly to warrant an abandonment, the owner being thus on the spot would be bound instantly to make his election; and then if he did abandon, the property would pass at once to the underwriters, with all its hazards and chances, and if he did not, would remain with him as before the occurrence. Now the proper occasions for abandonment are, as I take it, where there is at the time a total loss, or interception at least, and cessation of all use of the vessel, with a chance, however, of its recovery—as in the case of capture or embargo, where there is a chance of recapture or liberation, or of stranding, with reasonable apprehension of ultimate wreck, but a chance of getting off, or of such extensive sea damage as probably could not be repaired but at an expense beyond the value, or (in some cases) not in sufficient time to make the voyage worth pursuing, though still with a chance of being accomplished on easier terms. In all these cases, the owner, on the spot with the underwriters, would plainly have his option, and might either retain the property for the favourable chances, or pass it at once, with all its consequences, to the underwriters, taking in its stead the full sum insured. But this is only because in such circumstances he must have seen and known these things to have happened which gave him the right so to act. And these, no doubt, are the most common cases in which the property would pass as from the date of the occurrence.

But suppose, on the other hand, such a case as the present, and assuming that the owner and underwriters had been both on board the vessel when she struck on the iceberg, and that in point of fact it ultimately [888] turned out that she had then received \*her death-blow, and that it was solely in consequence of that accident that she finally came into Liverpool as a wreck, or at least in such a condition as to be incapable of repair, except at an expense far exceeding her value when repaired, what, in the circumstances as now put in evidence, would have been the right or the duty of the owner in respect to abandonment? The important consideration, as it appears to me, is, that all that he could then have known, if he had been on board, would have been, that in consequence of the collision the vessel became very leaky, and in fact speedily became water-logged; but being timber laden, and filled up with large logs, she not only did not sink, but it was impossible to ascertain whether her actual leakage was owing to some small and inconsiderable portion of her planks being beat in, or to her whole frame and timbers being incurably broken and shattered, so as to be beyond the reach of any feasible repair. The nature and stowage of the cargo made it impossible while she was at sea for any one to know, or even to conjecture, whether the injury approached to either of these opposite extremes, or (as I think it ultimately turned out) to something between the two. But in the meantime she not only floated, but was capable of being navigated, and actually completed her voyage in nearly the usual time, and arrived with her cargo

at her port of destination, after running several hundred miles subsequent to her encounter with the iceberg.

In these circumstances, it appears plain to me, that even though the owner and underwriters had both been passengers in her together, there was no call, or even justifiable case, for abandonment on the part of the owner, nor any ground for maintaining on that of the underwriters, either that the right to abandon was lost by not being exercised at the proper time, or that the transfer of property which it effected, when ultimately made, should draw back to the actual date of the accident. From the first of these grounds of argument, indeed, he is finally excluded by the verdict, which finds that the abandonment was properly made, though many weeks after the accident (that is, the mere fact of the collision) was known. And with regard to the latter, I am really unable to understand how, if, in the circumstances supposed, the owner being on the spot \*would have remained the *bona fide* sole and undivested pro- [\*889] prietor till after he had landed and delivered his cargo, and then first discovered that his ship was irreparably damaged, and, in consequence of this discovery, had timeously and properly abandoned her, it could possibly be held that the property had, notwithstanding, gone out of him some six or seven weeks before, and this by the mere retrospective operation of a subsequent voluntary act not suggested by any facts which were or could be within his knowledge, or that of any other person, at that earlier period.

If I am right then in holding, first, That abandonment, when rightly made, passes the property of the ship only in virtue of a substantial voluntary assignment of the right of the owner; and second, That the only ground on which the transference so effected is generally held to have an earlier date than that of the actual abandonment, is, that the knowledge of the facts necessary to support it cannot generally reach the distant owner till some time after they are known to those with the ship, —I do not see how it can ever draw back to any earlier period than that at which those actually with the ship did, or could, first become cognisant of facts of this description. And, in the present case, I take it to be clear that, up to the time of the survey at Liverpool, (which was after the freight was earned,) no such facts were or could be in the knowledge of any human being. All that could be known before that time were merely certain external appearances, which might as well have been occasioned by small local injuries, capable of complete repair at a very trifling expense, or by fatal and irreparable damage; and if there would have been no call, and no case for abandonment, while nothing more was or could be known to anybody but these ambiguous appearances, it seems impossible to hold that the property should be held to have passed in consequence of a voluntary act, which was not, and could not have been legally performed, previous to the attainment of a more relevant knowledge.

That these appearances, or the knowledge of them, would not have warranted an abandonment, is fixed, indeed, by a necessary implication from the verdict of the jury, which finds that the abandonment actually made was properly and \*effectually made. But it was not so made till the 1st of September, 1842, while the whole of these [\*890]

appearances (and under their very worst aspect) were known to the agents of the pursuers as early as the 10th or 11th of August preceding, when the vessel came to a berth at the mouth of the docks at Liverpool, they themselves all residing (as well as the underwriters) at no greater distance than Greenock, to which there is a regular post from Liverpool twice every day. If the knowledge of these appearances, therefore, had raised any case for abandonment, that which was actually made was manifestly out of all time, not being in any way intimated till three full weeks thereafter. But they plainly could raise no such case; and the original owners consequently remained vested with the full right of proprietors, and acting *bona fide* in that character, with the knowledge and assent of the insurers, openly delivered and received the freight of the cargo; after all which the vessel being then for the first time in a state which admitted of inspection, a survey was immediately had upon her, and a report of her ruinous condition returned only on the 31st of August; and on the very next day the tender of abandonment, which has been found properly made, was intimated to the defenders. It is very material also to observe that, after all these facts were fully known to the underwriters, they still persisted in maintaining that the injuries the ship had received were far too slight to justify either an abandonment or a claim for total loss, and actually went to the jury on the recorded averment, "that she might be thoroughly and well repaired for a sum greatly below that which her value, when so repaired, would amount to." But on this and every other point, the verdict was wholly against them, being expressly, "that she was not worth repairing."

I have thus endeavoured to consider the case as one of abandonment merely; and I wish it to be understood that I rest my conclusions, in this view of it, on the following precise grounds:—First, That as abandonment truly resolves itself into a voluntary divestment, and assignment over of the owner's property in the ship, so it can never be justified except upon facts known to him at the time it is made, and consequently [891] never can be supported or affected as to any of its consequences \*by facts which, though previously existing, were not known, or capable of being known, to anybody at that time. Second, That the property thus passed merely by the voluntary act of the owner, can never be held to have so passed at any earlier date than that at which he, if present with the ship, might have attained knowledge of the facts, justifying his proceeding,—the only retrospective effect which can ever be ascribed to his actual cession of the property, where he is at a distance, being to hold him as assigning *nunc pro tunc*,—or as at the date when the intelligence on which he acts was, or might have been, sent off from the vessel. Third, That an abandonment must always be good when it is intimated within a proper time after facts sufficient to justify it have first come to the knowledge of the owner, and will pass the property, with all its accessories, from the time when those present with the ship first came (or might have come) to that knowledge, but from no earlier time. And, as a corollary or conclusion from these several propositions, Fourth, That, so long as no facts justifying abandonment were or could be known to those present with the vessel, the owner must be held to have remained



fully vested with the property, and entitled, of course, to realize and appropriate all the profits and benefits of ownership earned or arising anterior to the first possible discovery of such facts, their existence, while latent, being of no more effect than their actual non-existence.

It is on these grounds that I think it safest and most advisable to rest my opinion. But it is still to be kept in view, that it is separately and distinctly found by the jury, "That the vessel was a total loss, irrespective of decayed timbers and deficient sails;" and this fact being now sufficiently settled, it seems difficult to hold that a mere term of abandonment, not necessary to support the claim for such a loss, and which is allowed to the owner as a privilege, and for procuring him readier access to his indemnity, should have the effect of depriving him of any benefit which he would confessedly have had if the finding of a total loss had stood alone in the verdict. On either view, however, I am of opinion that the freight should remain with the owners.

\*The result of the opinions was this;—In favour of the claim of the underwriters,—Lords Justice-Clerk, Medwyn, Moncreiff, [\*892] Wood, and Robertson, of the consulted; and Lords President and Mackenzie of the consulting judges.

Against it,—Lords Cockburn, Cuninghame, Murray, and Ivory of the consulted; and Lords Fullerton and Jeffrey of the consulting judges.

The court pronounced the following interlocutor:—"Find that the defenders, the Greenock Marine Insurance Company, with whom insurance was effected only on the ship, are entitled, in accounting with the pursuers, to have placed to their credit their due proportion of the freight, amounting to £1402, 2s. 2d., subject to such deductions as may be found competently to affect their interest in said freight; and remit the cause to the lord ordinary to hear parties on such deductions, and to take such steps as may be requisite for the investigation and determination of the same, and of the defenders' proportion of the freight; as also to dispose of the whole other matters remaining to be determined under the conclusions of the libel: Reserving the effect of this judgment in the question between the pursuers and those of the underwriters on the ship, who are also underwriters on freight: Reserving also the expenses of the discussion of the question of freight, to be disposed of along with the expenses already reserved, and all other expenses of the cause."

The defenders having appealed to the house of lords, the judgment was affirmed.

The LORD CHANCELLOR.—My lords, in considering the question reserved by the jury for the decision of the court, the facts as found by the verdict, must be the ground upon which such consideration must proceed; and if this be properly attended to, much of the apparent difficulty will, I think, disappear. The verdict finds, first, That there was a total loss of the Laurel; secondly, That the Laurel was properly abandoned, and not worth repairing. The latter, indeed, is a consequence of the first, rather than a distinct finding. The verdict finds \*for the plaintiff, which involves a finding that the total loss was within the [\*893] period covered by the policy. The verdict finds the total loss to have arisen from the ship having come in contact with an iceberg on the 27th

of July, and also from her having grounded at the dock at Liverpool on 11th of August. In my view of this case, it is not material whether the total loss is to be considered as having been complete on the 27th of July, or on the 12th of August, for the voyage was not completed at either of those dates. It was, indeed, argued, that the voyage had been completed at the latter date, and the freight earned at that time. The freight was, in fact, subsequently earned by the delivery of the goods; but at the last date to which the total loss can be referred, viz., the 12th of August, it had not been earned. If, instead of timber, the cargo had been of a perishable quality, and therefore destroyed by the ship's filling with water on the 12th of August, could it have been contended that the freight had been earned? The facts of this case upon this point are identical with those in *Samuel v. The Royal Exchange Assurance Company*, 8 Barn. and Cress. 119, in which a ship, having been lost whilst moored near the dock-gates at Deptford, waiting to be admitted, the owner was held entitled to recover against the underwriters for a total loss,—the place where the vessel was moored not being the place of her ultimate destination. The case is the same as it would have been if the ship had ceased to exist as such on the 27th of July, and the cargo had been brought home and delivered by other means. This case, therefore, is one of a total loss happening before the completion of the voyage. Now, to constitute a total loss, the actual annihilation of the subject of the insurance is not necessary,—it is sufficient if the expenses of repairs would exceed the value of the ship when repaired.

In all cases in which the subject is not actually annihilated, the assured are entitled to claim, and claiming as upon a total loss, must give up to the underwriters all the remains of the property recovered, with all benefit and advantage belonging or incident to it, or, rather, such property vests in the underwriters. Now, the freight which a ship is in the course of earning is a benefit or advantage belonging to it, and is as much to [894] \*be given up to, or to become the property of, the underwriters paying for a total loss, as any other matter of value belonging to, or incident to, the subject insured. It cannot be of importance at what part of the voyage the accident happened; and the property in the vessel is changed by what amounts in law to a total loss. In *Benson v. Chapman*, 6 Manning and Grainger, 792, the ship, soon after leaving the port of lading, sustained damage sufficient to entitle the owner to recover as for a total loss; but the captain had repairs done at an expense beyond what a prudent owner would have incurred, and he brought the cargo home, and the freight was earned; but the court held that the total loss of the ship carried with it the total loss of the freight. Chief-Justice Tindal says,—“The assured has sustained a total loss of the freight if he abandons the ship to the underwriters on ship, and is justified in so doing; for, after such abandonment, he has no longer the means of earning the freight, or the possibility of ever receiving it, if earned—such freight going to the underwriters on ship.” The damage amounting, as between the assured and the underwriters, to a total loss, the abandonment did not alter the relative rights of the parties; and the principle of that decision was, that the plaintiff, the owner, was entitled

to recover as for a total loss of the freight, because the total loss of the ship carried with it the total loss of the freight; and though the freight was afterwards earned, it did not belong to the owner, but to the underwriters on the ship. If, then, in that case, the freight, though actually earned by the ship after what amounted to a total loss, as between the owner and the underwriters, did not belong to the owner, but to the underwriters on the ship, how, in the present case, can the freight earned by a delivery of the cargo after a total loss of the ship belong to the assured?

In the case of Davidson, 5 Maule and Selwyn, 79, the ship was on her voyage, and in the course of earning freight, when captured. She, by the abandonment, became a total loss as between the owners and the underwriters; but that cannot have greater effect than an actual total loss. In this state of things, the ship was recaptured, and earned her freight—which was held to belong to the underwriters on the ship, although \*the owner had abandoned it to the underwriters on the freight. Lord Tenterden says,—“I have never heard of an [\*895] instance in which the assured, after abandoning the ship to the underwriter, has stepped in and claimed the freight as against the underwriter. On the contrary, the practice has been uncontested, that the abandonee has received the freight.” Unless the title of an abandonee, in cases in which abandonment is necessary, be better than the title of an underwriter upon an actual total loss not requiring abandonment—which cannot be—(an optional total loss made absolute by abandonment cannot have an effect greater than, or different from, an actual total loss)—these authorities are decisive of the present case—the jury having found an actual total loss.

In putting the case upon this ground, I must not be understood as disregarding the grounds upon which the opinions of the majority of the judges appear to have been founded; but it is sufficient for the present purpose to rest the judgment upon the most simple principle and most unquestioned authorities; and being satisfied that these grounds are sufficient to support the judgment of the Court of Session, I think it unnecessary to enter into a discussion of points which have occasioned so much difference of opinion in the court below. I, therefore, move your lordships to affirm the interlocutor appealed from, with costs. I have to state to your lordships, that my noble and learned friend, not now present, Lord Brougham, has communicated to me that, upon considering this case, he has come to the same conclusion that I have—that the interlocutor appealed from should be affirmed.

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The question raised in the second of the cases given in the text was one of considerable difficulty. On the part of the owners of the vessel in question it was not disputed that an abandonment was equivalent to and operated as an assignment, and that therefore freight subsequently earned passed to the underwriters on the vessel as an incident of it. The specialty in the case was, that the cargo had been delivered, and consequently the freight earned before the offer \*of abandonment took place. The vessel had been materially [\*896] damaged during her voyage by coming in contact with an iceberg, and

she again sustained considerable damage on her entrance to the Liverpool docks. She was afterwards put into a graving dock, where she delivered her cargo. Some days after the delivery of the cargo the ship was surveyed, and found to be damaged to such an extent as to render her not worth repairing. It was then that the owners offered to abandon the ship to the underwriters, and thereafter sued them as for a total loss. The question therefore raised was, Whether the abandonment was to take effect from its date merely, or to have a retrospective effect from the date when the total loss must be held to have occurred? In the court below there was a great difference of opinion, the judgment sustaining the claim of the underwriters being supported by a majority of one merely, the whole court having divided seven to six. The judgment as affirmed proceeds upon the ground that the act which entitles the owner to elect as for a total loss is the date at which their rights and those of the underwriters respectively must fall to be determined; and the judgment appears to be well founded. It is in the option of the owner to claim as for a partial loss, and if he does so the freight will necessarily belong to him. If, however, he elects to claim as for a total loss, then the vessel must be held to belong to the underwriters from the date at which the total loss, either actual or constructive, was held to have taken place.

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WHERE A VESSEL HAS BEEN ABANDONED TO THE UNDERWRITER ON THE VESSEL, WHO THEREBY ACQUIRES RIGHT TO THE FREIGHT SUBSEQUENTLY EARNED, THE OWNER HAS NO CLAIM AGAINST THE UNDERWRITER ON THE FREIGHT FOR THE LOSS OF THE FREIGHT.

### TURNER v. SCOTTISH MARINE INSURANCE COMPANY.

Feb. 12, 1851.—S. 13 D. 652. House of Lords, March, 3, 1853. 1 Macqueen, 334. 25 S. Jurist, 274.

IN consequence of the judgment in the case of *Stewart v. Greenock Insurance Company*, see *supra*, p. 844, an action was brought by the owner of the *Laurel* against the defenders, with whom an insurance on the freight had been effected for £1000, in which they set forth, that by the above-mentioned judgment they had been found liable to account to the underwriters on the hull and materials of the ship, for the whole [\*897] freight earned \*by the "*Laurel*" during the voyage, as for moneys had and received on their behoof; that this freight, insured as aforesaid, had, in the circumstances set forth, been totally lost by the pursuers, through perils falling under and arising during the currency of the above policy on freight, and that the defenders were, in terms of their policy, due to the pursuers the said sum of £1000, secured by the same upon the freight of the ship, with interest. The summons concluded for payment of the above sum.

The Scottish Marine Insurance Company pleaded, that no loss of the freight had taken place under the policy libelled. On the contrary, the freight had been earned and received, and the insurance was thereby at an end, without any contingency having happened which could render the defenders liable. The freight was received by the owners them-

selves, and if it was now to be paid over or accounted for to other parties, the underwriters on the ship, this was in consequence of the act of the pursuers in abandoning their vessel, or of the separate contract of insurance on the ship which they had entered into.

The lord ordinary, in respect of the importance of the question at issue in point of precedent, and of its connexion with the former case, reported the cause.

The court pronounced the following interlocutor:—Repel the defences: Find that the pursuers are entitled to recover the freight under the policy of the “Laurel” libelled on, in respect that the vessel was a total loss: Therefore, decern against the defenders for the sum of £1000, with interest from and after the 11th day of August, 1842: Find the pursuers entitle to expenses; allow an account, &c.

LORD JUSTICE-CLERK.—My opinion rests on some simple propositions:—

1. The verdict and judgment in regard to this vessel, the “Laurel,” fix that there was a total loss of the vessel.

2. This was a proper total loss, according to all the best authorities and cases. [\*898]

3. This loss arose from the perils insured against—the perils of the sea.

4. There is no case here of a constructive loss, so far as that is different from total loss. Abandonment, in the proper sense of the term, was not necessary to give the assured right to claim as for a total loss. Notice of the result, that the underwriters may look after their own interest, and make the most of the wreck, is a different matter from abandonment.

5. We have no such case here as in *Benson v. Chapman*, in the House of Lords, in which the captain, acting within his competency, elects to repair for his owners, but commits a mistake in not acting as a prudent owner would do,—viz., by not repairing; and then the owner afterwards, when the vessel arrives sound and safe, attempts, in respect of the outlay, to go back on what the captain did, and proposes thereafter to claim as for a total loss, as if abandoned at the time of the disaster. No such case occurs here.

6. Then it is settled law, that the total loss of a vessel—which total loss may occur though the vessel is brought to port, the cargo delivered, and freight, therefore, in one sense, earned—gives to the underwriters on ship the right to the freight. I call it freight, for it is really freight and not salvage. The vessel, though a total loss, has been brought to port, has held together so far as to bring the cargo to port, and, therefore, though a wreck, freight is due. But being a total loss to the assured, they must, on claiming on their policy on the ship, give up the vessel, and all its benefits and earnings, to the underwriters paying the value of the ship. This is now settled law, and always appeared to me very clear, on the plain principles of indemnity on which the contract of insurance is founded.

7. The freight is lost to the owners, in such case of total loss, by and in respect of the perils of the sea causing total loss, just as completely

and as necessarily as if the vessel foundered in the course of her voyage.

8. The insurance on freight is against the perils of the sea.

\*9. The underwriters must, taking the general case, pay the [\*899] freight in cases of total loss.

10. There is no exception or distinction taken, in the actual contract contained on the policy on freight, between one species of total loss and another. The freight is insured against loss from the perils of the sea, without qualification. The law, again, draws no distinction of any kind, or as to any particular, between total loss of one sort or another. The rights and liabilities are the same, under the contract, in all cases of total loss.

Then, as the total loss of the vessel insured gives to the underwriter, of legal necessity, the right to freight, if freight is recovered, the loss of freight to the owner insured on ship, is the result of the perils of the sea, just as directly as if the ship had foundered. In either case, the assured loses freight in respect of the ship being a total loss.

The insurance on freight is against loss from perils of the sea; and wherever there is a total loss, the freight must be paid by the underwriters on freight. The underwriters may qualify their contract by distinguishing between one kind of total loss and another: But law does not draw any distinction, and the contract of insurance on freight applies equally, by its terms to every total loss.

This view is taken, I think, in all the cases in which the question has been viewed in relation to a total loss; and care must be taken to distinguish, as to this matter, between total loss and a constructive loss from abandonment, in the proper sense. In the latter, the party may recover on the ship; but if he has abandoned in circumstances in which it turns out that the vessel, having been repaired, completes in safety her voyage, and earns the freight as a complete vessel though repaired, the freight is not claimable from the underwriters on freight, though it follows the ship into the hands of the underwriters on ship. The owner was entitled to abandon the ship; but he made a miscalculation for his own interest. This was the question, and the only question, in *McCarthy v. Abel*, from which case some expressions of Lord Ellenborough are quoted, as if applicable to the question in a case of total loss. This case was prior to [\*900] all the other authorities. The ship was laid under the Russian \*embargo, and abandoned. She was relieved—the freight paid to the underwriters—but could not be claimed under the policy on freight, there being no total loss. It is well pointed out by Chief-Justice Dallas, in *Idle*, that these expressions have no such general meaning as that ascribed to them, and he points out the different question which arises in a case of total loss. The same view of Lord Ellenborough's expressions has been uniformly taken by all the authorities, and in all subsequent cases. Then the judgment in *Idle* seems to fix principles which directly govern this case. The law is fully explained in *Benson v. Chapman*, by Chief-Justice Tindal; and in the exchequer chambers, and house of lords, to which that case was carried, not one word of dissent from the law so stated, fell from any of the judges or the law lords. In giving the opinion of all the judges who attended, 2 Clark and Finn. N.

S. p. 718, Baron Alderson assumes the law of Chief-Justice Tindal, provided there had in point of fact been a total loss. But in that case the owner attempted to throw aside what the master had done, and said he was entitled to abandon, as at the date of the disaster, after the vessel, repaired by the master, acting within his competency and on his best judgment, had arrived safely, and the owner, through his creditor assignee, had actually drawn the freight, the vessel having arrived safe and sound.

But in this very case of the "Laurel," Lord Cottenham, having this question directly in view, expresses his full concurrence in the law laid down by Chief-Justice Tindal.

Consider the consequences of any other result. An owner is entitled to protect himself against total loss by insuring both ship and freight by separate insurances, if he chooses. The result would be the same even if both were insured in one policy. It is not disputed that, if the ship founders, he can recover also for freight—the loss being total. He can recover for partial loss of freight in other cases. But if, when the ship is a wreck, and the loss total, so that he can recover its full value, but the wreck is brought into port, and can deliver the cargo, the freight then belonging to the underwriter on ship, if he cannot be recompensed by the underwriter on freight, here is a case, of not unfrequent occurrence, in which, though there <sup>is</sup> a total loss, he cannot protect himself (on the plea of the defenders) against loss of freight, [\*901] although separately insured on freight, and though the vessel is totally lost. This is a very odd result—that that shall be total loss under one policy by perils of the sea, which is no loss at all, in the eyes of the law, under the other.

But there is an entire fallacy in the argument, that freight is earned in this case, in the only sense in which that expression has any meaning, in reference to the policy of insurance. That term is used in reference to the ship as a vessel completing her voyage, and so earning freight, as the vessel on which the policy runs. When there is a total loss, such as in this case, the vessel is a wreck—she has not, as the ship on which the policy runs, earned freight, in the correct sense of the term. She has been lost; and though the cargo is delivered safe, and so its carriage must be paid for, yet the ship is gone. The ship has not got the freight; but the underwriters are enabled, out of the wreck, to save the cargo—just as if they had, in this case, sent tenders out into the Mersey, in case the ship should sink, and brought at their own expense the cargo up safe to port. In the latter case, would the freight not be due under the policy—though the vessel had sunk and not got up to Liverpool at all—because, forsooth, the cargo having been delivered, the underwriters would draw freight? The policy for freight is on the ship—as the property of the assured; it is the ship which is insured against perils of the sea to the extent of the freight; and if the ship is a wreck and a total loss, and the freight thereby lost, then the underwriters on freight must indemnify that loss to the assured; else in one important case of a total loss, a party cannot effectually insure against loss of freight.

It is argued, that the loss of freight to the owner is not the result of

the perils insured against : That it is the condition attached to his claim under a different contract of insurance, viz., the policy on the ship : That it is from the voluntary act of the owner of the ship choosing to claim under that policy that he lost the freight : That if he had submitted to the loss of the ship, and not claimed under the policy on the ship, he would have got the freight : But, by claiming the value of the [\*902] \*ship as a total wreck, he thereby had to hand over the right to freight to the underwriter on ship—and hence, that he can have no claim under the separate policy on freight. I apprehend this plea on the part of underwriters is perfectly inadmissible, and against all equity. One underwriter cannot pretend to separate his case from the general interest in the ship, or to allege that his contract on freight, a subordinate and consequential contract, had no reference to the universal custom of trade, and to the ship as also insured against the perils of the sea—just as if some one, for the first time in the history of ships, had, unexpectedly to the underwriter on freight, insured the ship itself, as a thing hitherto unknown in the law merchant. I cannot take this plea from the underwriters on freight—often, also, the very underwriters on the ship's hull and materials, as in this very instance. Every underwriter on freight, as he makes his contract in reference to the particular ship, on a particular voyage, so he must be held to contract, as he undoubtedly in point of fact does contract, in reference to that ship, as either known to have a policy on hull and materials, or as in all probability, certainty it may be called in nineteen cases out of twenty, to be insured. Hence his contract for insurance of freight on that ship has reference to that vessel as sailing under insurance on hull and materials also. When he insures the freight, he knows all the consequences ; and to allow him, after a total loss, to separate his contract from the state and condition of that ship, as itself insured, would really be blinding one's eyes to the known facts of the common case of all such contracts, and the usual custom of trade. And in this case such a plea requires us wilfully to shut our eyes, in order to exclude the fact, that these very underwriters insured the ship itself—calculated on getting right to freight in such a case of total loss as the present—and have actually drawn the freight, in respect of the perils of the sea, which caused that total loss.

This notion, then, that in regard to the liabilities of underwriters, the underwriter on freight is entitled to say that he does not insure in reference to the vessel as itself insured, and that he has no regard to the liabilities and results of insurance on the ship itself, seems quite extravagant. No doubt the loss [\*903] \*must be total, that is to say, the vessel must be a wreck, so that the assured may claim the value of the ship. Then, if the underwriter can yet save the cargo, good and well. The wreck has passed to him to make the most of ; and if he can discharge the cargo, he will be paid though the loss is total. But then it would, in my opinion, be too much to say, that because the assured claims under the one insurance, the loss being total, he is not to have the indemnity of his contract of insurance on freight entered into to protect him against total loss, although a total loss has occurred.

It may be too technical a view to adopt—but I own it appears to me



to deserve much attention—that the insurance for freight is in fact an insurance on the ship as much as any other ; and hence, that there cannot be a total loss under the one policy, which is not in terms, and by the nature of the risk under the policy on freight, a total loss also under that policy.

The pursuers, therefore, must have judgment.

Lord MEDWYN.—I hold it to be clear in this case, that the loss of the “Laurel” was a “total loss,” as found by the verdict, and that it did not require express abandonment, although notice to the underwriters was very proper, that they might know that what was now wreck was lying in port at their risk ; that, on this state of matters, the previous judgment as to the freight, or payment for bringing home the cargo, being transferred to the underwriters on the ship, proceeded, and therefore that this occurred not by the will of the owners converting a dubious into a constructive loss—a voluntary act on their part—but was occasioned by the perils of the sea producing a total loss.

There is certainly, on a first view of the case, much plausibility in the plea, that as our law admits of a separate insurance on the ship and on freight, that if the cargo is brought to port and landed safe, so that the owners of the cargo pay what they stipulated to pay as freight, and thus the freight is in truth earned, then there can be no farther claim upon the underwriters—the risk is at an end, and the freight has not been lost—it has been paid to the owners ; and such a claim as is here \*made arises out of the effect given to a separate contract, with which this has no concern, namely, an insurance on the ship. [\*904] Each of these contracts, it should seem, ought to bear its own burden, and the burden of the one should not be increased through any point affecting the other. If there was only an insurance on freight, but none on the ship, the owner remaining so far his own insurer, there could have been no pretence for claiming under the policy on the freight, if, as in the present case, the cargo having reached its destination, the freight had been received by the shipowner, although at the port of delivery the ship became a total wreck.

But plausible as all this may seem, I am inclined to hold that the present claim is well founded : That even if the underwriters on the freight were entitled to say that the money paid by the owners of the cargo was freight, and not a mere salvage, not earned by the pursuers’ vessel but by the wreck belonging to the underwriters on the ship, it was however lost to the insured, not by their voluntary act of cession of the ship, but by the perils of the sea, which were comprehended under the defenders’ policy of insurance, which, making the ship a total loss, went to the underwriters on the ship, admitting of no other assignment by a voluntary abandonment. The verdict of the jury excludes all idea of a constructive total loss, and has fixed it as a total loss through the perils of the sea alone. This failure in the case excludes from our consideration all those cases which have occurred where the freight has been recovered after a constructive total loss has occurred upon abandonment.

But while nothing has been done by the owners to abandon as for a

total loss, still, as this has been occasioned through the perils of the sea within the policy, the loss of the freight has occurred to them just as effectually as if the ship had gone to the bottom. It is true it has gone away from them, lost to them, not paid by the underwriters, however, but by the owners of the cargo to the underwriters on the ship, to whom the wreck now belongs, with all its incidents and recoveries, having ceased to be a ship the property of the insured. The freight paid for bringing home the cargo, is one of these incidents, as it has been found, which follow the wreck, and is just as much entitled to the denomination of salvage for the freight, although, in the \*circumstances, [\*905] it produces an equivalent sum, as the timbers of the wreck contribute to the salvage what is saved from the vessel. In short, the freight was not earned to the pursuers' ship, or by or on behalf of them, it was lost to them, and in virtue of an act quite irrespective of any volition or act or election on their part; totally different from what would have been the case on a sale or constitution of a mortgage on the ship by the owner, or even in the event of a constructive total loss.

The obligation of the underwriter on the freight is not so much that freight shall be earned (supposing even that we are not entitled to term it in this case salvage for the freight,) as that the insured shall not be deprived of his freight by perils of the sea. This, accordingly, has most unquestionably occurred here. What might have been freight if it had gone into the pockets of the owners and remained there has now gone to the underwriters on the ship, as following the wreck, which the injury sustained through the perils of the sea, carried without other than the legal abandonment to them, and thus there has been lost to the owner the freight, by the very risk against which the assurance was effected. This seems to me to have been the law laid down by Chief-Justice Dallas in the case of *Idle*, and by Chief-Justice Tindal in the case of *Benson*, although the judgment afterwards went the other way on a different view being taken of the import of the special verdict as implying a total loss or not; and the opinion of Chief-Justice Tindal is appealed to with approbation by the lord chancellor in the former case of the *Laurel*, upon the facts, as at that early period of the case held by his lordship.

It is an accidental circumstance, but not immaterial, that the defenders here who resist this claim for freight are also underwriters on the ship, and have received their share of the sums paid by the owners of the cargo. To this extent, then, there is no hardship; and any alleged anomaly by an underwriter on freight being called upon to pay freight, as on a total loss of ship, when the cargo is brought home, may generally be avoided by the underwriter declining to underwrite on the freight without an equivalent undertaking on the ship.

I am therefore for the pursuers.

[\*906] \*Lord MONCRIEFF.—This case may not be very simple in the law applicable to it; but it is at least a very simple case in the facts.

The owners of the *Laurel* effected an insurance on the ship for the particular voyage specified; and they at the same time effected a separate insurance on the freight, at and from Quebec to a port of discharge

in the United Kingdom, upon any goods or merchandises, until the same be there discharged and safely landed. The form of the policy cannot, I apprehend, alter this, that the two insurances are quite separate.

It happens that some of the persons who were underwriters on the ship were also underwriters on the freight, and the present defenders are among these. But this is accidental, and, as it appears to me, altogether foreign to any question concerning the effect of the insurance on the freight. The two contracts are entirely distinct, and the parties to them might have been all different.

The ship was loaded, and sailed on the voyage. In the course of it she met with severe weather, and suffered one very serious accident, that placed her in great peril; and before she was actually moored in the harbour of Liverpool, certain other events occurred, by which she was greatly damaged, and was found, upon examination, to have been so much injured that she could not be repaired except by an expense greatly exceeding her value. In these circumstances she was formally abandoned by the owners to the underwriters on the ship: And it is settled, by a verdict of a jury, that she was properly so abandoned.

In the meantime, the cargo, which consisted chiefly of timber, was safely landed and delivered to the consignees, and the freight was actually paid to the owners. Though there was an abandonment of the ship, there had been no abandonment of the freight; and it was accordingly exacted by the owners, and actually paid to them.

Upon the first view of so simple a case, it might appear to be a very clear matter, that the owners of the ship having actually earned the freight, and received payment of it from the consignees, cannot possibly have a claim for payment of that very freight against underwriters, who undertook no obligation \*whatever, but for the safe delivery of the cargo, and payment of the freight upon such delivery. The [\*907] engagement was fulfilled, and the loss insured against did not take place. The consignees got the cargo in safety, and they paid the freight, which was the only thing insured to them.

How, then, is it that the owners of the ship should still be allowed to maintain a claim against underwriters on the freight, for payment of that freight, in virtue of the policy? I should have thought this to be impossible, and had believed, as I thought on good authority, as stated by Mr. Baron Alderson in the case of *Benson v. Chapman*, that indeed, under such a policy, there is no "instance to be found in which an action for a total loss of freight has been held to be maintainable where the freight has been actually earned."

But this matter, apparently so clear, has been unfortunately complicated in consequence of the occurrence of another case, with which, I apprehend, it ought not to be mixed. That case arose upon the policy of insurance of the ship *Laurel*, in regard to the same voyage. The ship had suffered great damage, in consequence of which she was abandoned by the owners to the underwriters in the separate policy. The jury had found that she was properly abandoned; and then a very difficult question arose, whether, as it was admitted that the freight had been received by the owners, they were bound, in claiming a total loss from the under-

writers, to pay over that freight to them as an incident to the ship abandoned. On that question the court were nearly equally divided, the judgment being determined by a single opinion of majority. That judgment, however, upon full hearing in the house of lords, was affirmed. In the judgment of the court there was a reservation inserted in these terms:—"Reserving the effect of this judgment in the question between the pursuers and those of the underwriters on the ship, who are also underwriters on freight." But this reservation merely leaves the point undisposed of as not to be affected by the judgment in the other case, and can have no effect on the question itself between the owners and the underwriters on freight. And I should think it very clear that if the defenders in the present action are liable for their shares of the freight, [908] under the policy sued on, all the underwriters on that freight, \*whether underwriters on the ship or not, must be equally liable for their own proportions.

And now, the owners of the ship, finding that they cannot keep to themselves the freight that was duly earned and paid to them, turn round on the underwriters on the freight under a different contract, and insist that they shall pay to them the value of that freight, as if it were a lost freight under the terms of the policy. But it is merely accidental that any of the underwriters on the freight are also parties to the insurance on the ship. They might have been entirely different; and the question would have been still exactly the same, whether the owners under an insurance of freight are entitled to recover such freight as a loss by perils of the sea, notwithstanding that it was fairly earned by delivery of the cargo, and was actually paid in consequence.

It appears to me, with all deference to others, that it would be a very singular operation of the law, if such a claim should be successfully maintained.

But there is another peculiarity in the case. It happens in this case that the ship and the freight are both separately insured. This is purely accidental. It might have been otherwise. The underwriters on the freight, as such, have nothing to do with any other contract than that insurance on the freight. And the case might have been that the ship was not insured at all, and that no question had arisen as to the effect of an insurance on the ship itself. And then the single matter would have been, that the owners themselves, though their ship had been totally lost, or so damaged as not to be worth repairing, had nevertheless received actual payment of the freight in consequence of the safe delivery of the cargo. In that case, how would the claim on the part of these owners have appeared, that the underwriters on the freight should pay that freight to them a second time, though they had already received it? And yet the owners would have been suffering the total loss of the ship, without any means of relief. The case so put is a perfectly fair one to test the argument, and as yet I have seen no solution of it. For, as there is no necessary connection between the two contracts of insurance, the argument leads to this, that the owners, having no insurance on the ship, [909] might \*insist for the freight as a loss, after it had been earned, and paid to themselves.

I confess that, without looking more closely into the authorities on the subject, I must have thought such a claim altogether inadmissible.

Or again, how would it have stood if the court in the former case between the owners and the underwriters on the ship, had determined that the owners were not bound to make over to those underwriters the freight actually recovered? The owners would then have had the freight in their pocket, and could not possibly have claimed it a second time. But how can the present question be affected by the judgment which the court and the house of lords pronounced in the other case? I apprehend that they have no connection with one another. Some may think it hard that the owners should not recover the value of the freight from the underwriters on freight, after it has been determined that they are bound to account for the freight to the underwriters on the ship. But that will not determine that they have any legal claim to do so; and there would be at least as much hardship in saying to the underwriters on the freight, You shall pay the value of it, though it was not lost, but fully earned and paid, in order to indemnify the shipowners for their being obliged to give it to the underwriters of the ship, according to the law of the case. I apprehend that the claim, if it exists, must stand on its own basis, independent of anything that was determined in the separate case. And on what grounds of law or equity it can be so maintained I have yet been unable to discover. The underwriters of the freight, supposing they were different parties, could have no concern with the effect of a different contract of insurance on the ship. And I humbly apprehend that the case cannot be decided on sound principles, unless the two contracts are looked at as entirely separate.

How, then, does the law stand in such a case, as it is delivered by the ruling authorities?

In the case of *McCarthy and Others v. Abel*, which was a case of embargo, it was held, that where the owners had separately insured ship and freight, and abandoned them to the respective underwriters, but where, the embargo being removed, the ship\*completed her voyage, the insured could not recover as for a total loss of freight, [\*910] the freight having been in fact earned. And Lord Ellenborough said, "If the fact be merely looked at, freight, in the events which have happened, has not been lost, but has been fully and entirely earned and received by or on behalf of the plaintiffs, the assured; and if so, no loss can be properly demandable against the underwriters on freight, who merely insure against the loss of that particular subject. But if it have, or can be considered as having been, in any other manner or sense lost to the owners of the ship, it has become so lost to them, not by means of the perils insured against, but by means of an abandonment of the ship, the act of the insured themselves, with which, therefore, and the consequence, the underwriters on freight have no concern." The case in which this doctrine is said to have been rejected was essentially different in the facts.

The same doctrine was held in the case of *Everth v. Smith*. And then, in that of *Case v. Davidson*, Lord Tenterden said—"This is a principle clearly established, that if a ship be sold, the vendee is entitled

to the freight as an incident to the ship. And on that principle I form my judgment in this case, being of opinion that an abandonment is equivalent to a sale of the ship."

But though there are other cases which bear on the point, the decisive case appears to me to be that of *Benson v. Chapman*, ultimately decided by the house of lords so lately as 1847, in which the opinion of all the judges was delivered by Mr. Baron Alderson. That judgment is fully quoted in the case for the defenders in the present case. Mr. Baron Parke had just delivered judgment in the exchequer chamber, in which he stated the question to be—1st, "Whether the freight has been lost;" and 2d, "Whether it has been lost by the perils assured against." It was a very strong case for the owners, because the freight had only been earned by means of a large expenditure on the part of the master, in his own discretion, under very doubtful circumstances of prudence. There was no such thing in the present case. The ship here, with the cargo, was brought into Liverpool simply by the exertions of the master and crew.

[\*911] It was found by the verdict that the \*vessel was wholly lost. But Baron Parke said—"The second issue, that the vessel was wholly lost, must be understood to mean, the vessel irrespective of the freight, and not that the vessel was lost in such a way that the freight was also lost." And at last his lordship observed—"And even supposing the master to have acted erroneously, as the voyage was in fact completed, and the vessel did arrive in safety in his possession, and freight was earned and received on the voyage insured, it cannot possibly be said that there was a total loss of freight in fact."

The owners in that case had not themselves received payment of the freight—only for this reason, that the master had found it necessary to grant a bond of bottomry, the obligees in which thereby acquired an interest in the freight, and actually received the whole of it. But this was held equivalent to the owners receiving it themselves.

That case then went to appeal to the house of lords, and Baron Alderson delivered the unanimous opinion of the judges, that the judgment in the exchequer chamber should be affirmed. Lord Brougham moved the affirmance: and Lord Campbell said—"I think the case does not admit of any reasonable doubt. There is here neither a partial loss of freight, nor a total loss of freight, because the goods, the freight of which was insured, were loaded at the port of outfit, and were delivered at the port of destination, and the freight was paid. To be sure, it was not received by the owner of the ship—but it was received under his authority; and unless you are altogether to discard what the master had done, or to suppose that he had acted fraudulently, or without authority, there can be no doubt that the judgment should be for the defendant in error."

I find it very difficult to explain these authorities in any way by which the claim of the owners for freight in this case can be sustained. The argument seems to be, that because of the abandonment of the ship, and the freight being carried to the underwriters on the ship, it must be held that the freight was totally lost, according to the terms of the policy. But I observe that, in the course of the argument in the previous case before the house of lords, Lord Campbell (undoubtedly of the highest

\*authority in all such questions of common law) made this very pertinent observation—"But the ship and the freight are different subjects, and are capable of distinct insurances; and the question is, Whether the total loss of ship is the total loss of freight," Clarke and Finnelly, 2 N. S. 149. The lord chancellor seems to have decided that case on the ground that the verdict had found that the ship was totally lost, independent of the question upon the abandonment, though he carefully guarded himself against its being supposed that he did not approve of the grounds of the opinions of the majority of the judges in this court. But there was no question then before the house as to the insurance of the freight; and though it may be, that in some cases the total loss of a ship may infer a total loss of the freight, I cannot think that it could be so held in the present case, consistently with the authorities to which I have referred; and Lord Campbell certainly did not suppose it to be at all a necessary inference.

But I observe that, in the course of the argument, Lord Brougham presented what might seem to raise the very point.—"Suppose," says his lordship, "the freight and the ship insured with the same parties, what would be the consequence?" And the answer made by the able counsel, apparently without objection, was in these terms—"It has been held, that where the ship is lost, but not the freight, the underwriter on freight is not liable to pay. But that question does not arise here."

That question, however, has now been raised in the proper form. The owners did not raise it before; because, holding the freight to have been earned, they held also that it belonged to themselves, and was not to be made over to the underwriters on the ship. But it is now raised by an action at the instance of the owners, in order to relieve themselves from the effect of the former judgment.

I am very sensible that I may have misunderstood the effect of these English authorities—to which, however, we are bound to attend, because it is a branch of law in which the decisions of the English courts must generally regulate our judgments. And, as at present advised, I am not able to think that the claim of the owners for this freight, now made against the \*underwriters of the freight, can be sustained on [\*913] solid grounds of law.

Lord COCKBURN.—I am of opinion that the pursuers are entitled to decree.

The case has been argued with great ability, and very fully; but, in the view that I take of it, it all resolves into a very simple point.

The pursuers effected two separate insurances—one upon their vessel, and one upon their freight. Some strong and plausible views have been urged against the defenders, from the circumstance that they were the underwriters in both of these transactions. But this was a mere accident; and I consider the question exactly as I would if each insurance had been by a separate underwriter.

Now the ship was totally and actually lost. It was not a constructive total loss, but an actual one. I hold this fact to be fixed by the verdict, which finds "that the vessel was a total loss," and "not worth repairing."

Now, the instant that the vessel was totally and actually lost, the

freight was lost to the owners. They could not claim freight on account of a voyage not performed; and the voyage ceased the moment that the ship perished. Suppose that the ship and cargo had gone to the bottom, and remained there, there could, in this event, be no doubt that the owners of the vessel could not have compelled the owners of the cargo to pay the freight; but that they would have been entitled to make up for this loss by recourse against the underwriters on the freight.

But what took place here was this—The ship being actually and totally lost, the law abandoned it to the ship's underwriters; and the effect of this was, that the planks which had formerly composed the ship, accrued to these underwriters, with all that these planks might fetch. And what they fetched was, that the cargo, being wood, a floating article, was brought to the port of delivery, and in these planks. The cargo being thus saved, though not in the way, or in the ship, contemplated, the freighters were obliged to take it, and to pay what they had engaged to [914] give for its transport. But it was to the underwriter \*on the ship that they paid it. The parties dispute whether this was freight, in the strict sense of the word, or only salvage. The mere term seems to me to be immaterial. The truth is, that it was salvage due to the party that happened to bring the cargo home, but that the amount of the salvage was necessarily the same with the amount of the freight.

But call it freight. Still it was not the freight due to the shipowners. They did not claim it, and had no right to it, and did not get it. The exact casualty, therefore, against which they had insured, had happened. Whoever got the freight, they had lost it.

The whole plausibility of the defender's argument arises out of the accident, that the cargo happened to be brought home in the still cohering fragments of the old lost ship. This gives what was paid a freighty sort of appearance. But suppose that the vessel had been irrecoverably sunk or burnt, and that the cargo, being heavier than water, had reached the bottom, and had lain there, the freight, as such, would certainly have been lost, and the underwriters on the freight would certainly have been liable for it. Would these results have been avoided if the underwriters on the ship had raised the cargo by the diving-bell, and brought it home in a different vessel? Whatever claim this might have given them on the owners of the cargo, I do not think it would have made the slightest difference on the claim of the insurers against the underwriters on the freight. In law, this cargo was brought home in a different vessel. The original "*Laurel*," being totally and actually lost, did not as such exist; and the continuation of the name to its once component parts does not imply identity of ship. These are the very contingencies against which an insurance of freight is intended to protect the shipowner. His rights are fixed at the moment of the actual total loss.

If the defenders' principle be sound, I do not see how there can be a certainly effectual insurance of a ship and a freight at the same time. Because it must always depend on circumstances over which the shipowner has no control, whether the insurance on the cargo is to stand good. The freight is lost to him by the actual total loss of the vessel. But then, he can never tell whether the underwriter on the ship may



not still \*save the cargo, and claim the freight. And thus the insurer of the freight can never know whether he is not to fall [\*915] between the two stools of the lost vessel and of the recovered cargo. What he means to make himself certain of is, that he is to get the freight either from the owner of the cargo or from the underwriter; but the result is, that he gets it from neither. And this is a result which, if the defenders be right, can never be avoided; because the ship owner can never tell whether the vessel is to be lost or not, or whether, if it be lost, the underwriter is to save the cargo for his own sake, and claim the freight.

And where is the hardship on the underwriter on the freight? Did not he engage for his premium to secure the freight to the owner of the vessel? And has he done this? Certainly not. The underwriter on the lost vessel has, in bringing home the cargo and receiving the freight, done nothing but what he was entitled to do. And neither has the party who paid the freight. All the parties concerned have fulfilled their obligations except the defenders, who wish to escape from the liability they undertook by taking advantage of the very casualty against which they agreed to protect the pursuers.

I have examined all the English cases with the greatest care; and the result is, that when understood, they give no support to the defenders' case, but the reverse.

The defenders appealed to the house of lords.

*Argued for the Appellants.*—The respondents are here attempting to recover in the teeth of their own summons, which puts them out of court, for the summons expressly sets forth that the freight was in fact earned, and not only so, but that it was even paid to the owners. If, then, the freight has been paid, what are the respondents suing for? Nothing is clearer than that we must look to the contract of insurance on freight considered by itself. That contract amounts merely to this, that if the cargo is not delivered owing to some peril of the sea which prevents freight being earned, then the insurers will pay the sum which the freight would have amounted to. But they do not undertake that the freight shall be received \*by the owners—for this reason, that there might be an assignment during the voyage of the ship, in [\*916] which event the freight would pass to the assignee. They merely insure, therefore, that the cargo shall be delivered, *Everth v. Smith*, 2 Maule and S. 278. But an abandonee is in the same position as a purchaser, *Case v. Davidson*, 5 Maule and S. 79; 3 Moore, 116; and abandonment is a voluntary act, *McCarthy v. Abel*, 5 East, 388; 3 Moore, 151; 3 Brod. and Bing. 151. If an owner, therefore, abandon his ship, he thereby assigns the freight, and cannot recover for a total loss of freight as against the insurer of freight, *Morrison v. Parsons*, 2 Taunt. 407. Hence it was the voluntary act of the assured in abandoning the ship that caused the loss of the freight, and the insurer of freight cannot be liable. But whether it was owing to their voluntary act or not, it is at least certain that the cargo was delivered, and the freight earned; and Baron Alderson said, in *Benson v. Chapman*, 2 H. of L. C. 721, that there has never been a case where freight had been actually earned, and

yet an action for a total loss of freight was maintainable. Neither can it be said that this was a loss caused by the perils insured against. It is true the policy adds, "and all other perils and misfortunes," &c.; but this is a mere form of expression, and goes for nothing unless the peril alleged to come within this general description is analogous to, or of the same kind as, those particularly specified in the foregoing clause. That there was no loss by a peril of the sea, is clear from this, that if there had been no insurance of the ship there could have been no loss of the freight. Hence the loss must have been caused by the fact, of there being another contract with the insurers of the ship. Moreover, even if it could be said that the loss flowed originally from a peril of the sea, yet the cause was too remote to be a ground of action, according to the maxim, *non remota sed proxima causa spectatur*, as to the application of which, see *De Vaux v. Salvador*, 4 Ad. and Ellis, 431; *Powell v. Gudgeon*, 5 Maule and S. 431. But it is not even a necessary consequence of the total loss of the ship, that the ship is given up to the abandonee; for if the freight was of great relative value, no prudent owner would scruple to prefer retaining it for the sake of the freight. [\*917] If, then, the loss of freight merely \*depends on the accident of the owner putting in force his legal remedy (i. e. his right of abandonment) against the underwriter of the ship, how can it be said to be a loss by perils of the sea? which, in other words, brings us back again to the proposition, that the loss was caused by his own voluntary act, in electing to abandon. The difficulty of the case no doubt arises from the accessorial nature of freight, which has been long settled to go with the ship, *Case v. Davidson*, *supra*.

LORD TRURO.—What is the ground on which it is held that the freight passes to the underwriters? Was there ever a case where it did so, and where the owner of the ship had not abandoned?

No; we can find no such case. Abandonment seems the only ground of the freight's passing to the underwriters. Though, therefore, in one sense, freight is merely a quality of the ship, yet for the purposes of insurance, the ship and the freight are two distinct and independent subject-matters. Such, then, being the state of the law, the parties must be understood to have contracted in contemplation of that known law. The owner must have known that, in the event of his abandoning the ship, he would render the underwriter on the ship a *quasi* owner; and this being a voluntary act on his part, he stands in the same position as if he had actually assigned or sold the ship.

LORD TRURO.—Yes; you say, if the owner thought fit, he might have recovered the freight; but he chooses to put himself in a position where he could not recover it. He ought to have proceeded against the insurers of the ship, not for a total loss, but for the actual damage he had sustained, and thus he might have kept the freight.

Yes; or the policy of insurance on the ship might have expressly provided, that in the event of the ship becoming so damaged as to make abandonment a justifiable step, the remedy against the freight-insurer was not to be lost in consequence. *Emerigon on Bottomry*, by Hall, 36-

41, seems to say this might \*be done. But it was not done here. Yet it is sought to influence the liabilities and rights attaching [\*918] to the insurance of freight, by mixing it up with the consequences arising out of the separate contract of insurance of the ship. The judges below seemed to have assumed that an insurance of the ship was so customary, that it must be taken here that there was an insurance of the ship. But it often happens there is no insurance of the ship, or it is only partly insured, and such insurance of the ship may or may not be executed after the freight has been insured. How, then, can you incorporate into our contract, conditions flowing out of another future and contingent policy, which may or may not ever be in existence? It is clearly *res inter alios acta*. Then it is said, that what was earned here, was not freight but salvage. But this is a mere play on words.

LORD CHANCELLOR.—If it was not freight, how could the underwriters on ship bring an action, as the decision implied they could, for money had and received as such? But, indeed, it was sued for here *eo nomine*.

The name is not worth disputing about. The money had all the qualities of freight, and could have been enforced and recovered under that name. Freight at least is the name given to the remuneration for carriage of goods, not only by one ship, but also in cases of transshipment—see Jacobson's Laws of the Sea. The respondents, then, must be reduced to say, either that this is not freight, or that, it being freight, it became lost to them by other circumstances. If this is not freight, in what other way could freight have been paid, supposing no accident had ever befallen the ship? As to its being salvage, it is enough to ask, Who, then, are the salvors?

LORD TRURO.—Suppose the owners had insured only half or part of the ship, being their own insurers as to the rest?

That is this very case; and we have here, therefore, the owners pocketing part of the freight, and then turning round and suing us on the ground that that very freight was totally lost.

\*The following cases were also incidentally cited :—*Roux v. Salvador*, 3 Bingh. N. R. 266; *Cambridge v. Anderton*, Ry. [\*919] and *Moody*, 69; 2 B. and Cr. 691; *Mellish v. Andrews*, 15 East, 13; *Thompson v. Rowcroft*, 4 East, 34; *Sharp v. Gladstone*, 7 East, 24; *Leatham v. Terry*, 3 Bos. and Pull. 479; *Holdsworth v. Wise*, 7 B. and Cr. 794; *Samuel v. Royal Exchange Co.*, 8 B. and Cr. 119; *Moss v. Smith*, 9 Com. Bench, 94; *Arnould on Insurance*; *Benecke Pr. of Indemnity*.

*Argued for the Respondents*.—The ship was totally lost on 11th August, and that total loss existed, in point of law and in fact, independent of any notice of abandonment. Whatever rights, therefore, a total loss could confer, became vested in the owners on that day. The right then accrued, to sue both sets of underwriters on their respective policies, and could not be defeated by subsequent events. It is true the owners received the freight in the first instance; but they did so merely as agents for the underwriters on ship, and cannot be prejudiced by that circumstance. On the 11th August, then, the owner might have left

the ship to perish, for by the mere fact of the accident on that day, the wreck passed out of his hands. Lord Cottenham, in *Stewart v. Greenock Insurance Company*, Scot. Jur., and 2 House of Lords Cases, 159, says as much.

LORD TRURO.—Suppose the owner, on 11th August, had assigned or sold the ship, could the assignee have recovered freight before the delivery of the goods?

Of course an assignee has a right to the freight, because the voyage was not completed. If a ship is sold on the last day of the voyage, the vendee gets the freight, for there is no such thing as freight *pro rata itineris*. But here the whole mischief was done on the 11th August at latest, and before the ship entered the dock.

LORD TRURO.—Suppose she had been brought into dock, and had delivered her cargo, and immediately received some fatal accident, yet before the period of the policy on the ship had expired, who then would be entitled to freight?

[\*920] \*We admit the owner, and not the underwriter on ship, would be entitled in that case. But here the total loss occurred before the delivery, and therefore the right of action against both the ship and the freight-insurers accrued on the same day. In England, abandonment causes the total loss to relate back to the date of the accident, while, in France, it relates back to the commencement of the voyage, *Emerigon*, c. 17, § 9; *Code de Commerce*, § 386; 2 *Phillips' Ins.* (ed. 1840,) 417.

LORD TRURO.—But suppose the underwriter on the freight sets up as a defence, that the goods had subsequently been delivered, or that the time had not arrived for the delivery?

But if a total loss occurred on a certain day, is the owner to wait till some subsequent date to see whether the cargo may be delivered? In that case he might wait for ever; for if the ship existed at all, it might not be physically impossible for it to be refitted and brought home. Here it was no doubt possible for the owner to have had the goods brought home, but at an expenditure such as no reasonable man would incur. Assuming, therefore, as we are entitled from the verdict in the former case to do, that a total loss occurred on the 11th August, it necessarily follows that the owner had no longer the power to earn freight after that date. The wreck had passed out of his hands, and what signified it to him whether any third party might have speculated on the wreck, spent large sums upon her, and ultimately brought her home; his rights could not thereby be altered. It was the underwriters of the ship, then, who, in the contemplation of the law, here brought home the ship and delivered the cargo. Freight in one sense may be earned, and yet be totally lost, as is shown in *Idle v. Royal Exchange Company*, 3 *Moore*, 115; 8 *Taunt.* 755, which clearly supports our case—See also *Read v. Bonham*, 3 *Brod. and B.* 154. But freight has never been earned here in the sense of the contract of the freight-insurer. What was got was money, which the underwriter on ship was entitled to by choosing to bring the goods from that part of the sea, (where the total loss occurred) to harbour. Suppose a case where a ship strikes a rock,

and the peril is so great that the crew leave her to perish,\* the sole question would then be, whether the crew were justified in [\*921] so leaving her, and if they were so the right of the owner to recover on freight would be clear, and would be unaffected by the circumstances which might subsequently have happened—such as, whether the ship was ultimately got off and brought home.

LORD TRURO.—I know there are what may be called contingent total losses. Thus a capture is a total loss, while the ship is in the enemies' hands; but, then, if she be recaptured, the total loss is rescinded. Hence, in such a case, unless the owner brought his action for the freight before the ship was restored from capture, he could not recover.

There may be cases where the owner is justified or not justified in abandoning, but that cannot alter his right of action, if such right has attached at a particular point of time. We say here the owner's right accrued on 11th August. In cases of capture, or sudden abandonment in the hour of danger, we admit, that if the owner was in a position to recapture or repossess, he would be unable to recover in an action for freight. Then it is said it was our own voluntary act in abandoning the ship that caused our loss of freight. But when a ship is insured for £6500, and becomes so damaged that it is not worth £470, it is absurd to say that he elects the former sum; it is an abuse of language to call it a voluntary act. It is like A. refusing to deliver up B.'s goods, unless B. pays him £1000, and B. pays that sum; in one sense, it is B.'s voluntary act, yet he can nevertheless, on getting back his goods, recover back the £1000 which he had been improperly coerced to pay, *Ashmole v. Wainright*, 2 Queen's Bench, 837. So, in jettison, though the owner with his own hand throw goods overboard, that is held not to be a voluntary act, *Powell v. Gudgeon*, 5 Maule and S. 431.

LORD TRURO.—What was to prevent you claiming an average loss? You might have said, "I'll keep the ship, and I'll take average damage," which, in many cases, may be as much as 99 per cent.

\*We found it would be practically more advantageous to re- [\*922] cover for a total loss. Lastly, it is said, that if the ship had not been insured, we could not have had any pretence for the present claim. But it is enough to say, that in that event the present case could not have arisen, and our rights cannot be affected by what might have happened in such a contingency. If it be held that we are not entitled to recover, then the practical effect will be, that in future it will be impossible for an owner to insure both his ship and the freight at the same time, which hitherto he has always been protected in doing.

The following cases were also cited:—*Fleming v. Smith*, 1 H. of L. C. 513; *Everth v. Smith*, 2 Maule and S. 278; *Knight v. Faith*, 15 Q. B. 649; *Benson v. Chapman*, 6 Man. and Gr. 792.

LORD CRANWORTH, C.—The first observation which occurs in this summons is, that, *prima facie*, it discloses no case of freight lost at all. The cargo arrived safely in the ship, and was delivered by the owners to the consignees, by whom the freight was duly paid. Then, how is it that the respondents, the pursuers, say the freight has been lost? It is thus. They say the ship had been insured in several offices on policies

to the extent of £6500. The ship, when in dock, was examined, and found so much damaged that it was impossible to repair her. The expense of doing so would have been too great; the value of the ship when repaired, would not have been as much as the cost of repairing her, and therefore the owners claimed against the insurers of the ship as for a total loss of the ship; and, on the 1st of September, 1842, they gave notice to the underwriters, and abandoned the ship to them. The question was raised between the owners and the insurers of the ship, whether there had been a total loss. The Greenock Marine Insurance Company, who had insured the ship, resisted the claim and the owners raised an action and obtained a decree establishing that there had been a total loss. The proceedings in that action are thus stated—(reads from summons, and states proceedings in the action against the ship-insurers, and then in the present action.)

[\*923] \*The Court of Session, in the present case, decided in favour of the claim of the owners, and against the appellants, the underwriters of the freight. The underwriters, being dissatisfied, have appealed. There is a very elaborate judgment given below, which deserves, and has received, I have no doubt, the serious attention of your lordships. Three of the learned judges below—the lord justice-clerk, Lord Medwyn, and Lord Cockburn, sustained the claim of the pursuers, the owners. One judge, Lord Moncreiff, took a different view of the case, and considered that the claim of the owners was not made out.

My lords, I have given very anxious attention to these able and well-reasoned judgments, which fully disclose the grounds upon which the court, that is, the majority of the judges proceeded. Those grounds were these:—First, They considered that there was a total and actual loss of the ship before she was brought into dock. Secondly, That being so, and the ship having been abandoned to the underwriters, or, at all events, notice of the loss having been duly given to them, the damaged vessel became their property as from the time of the fatal injury, say on the 11th of August. It is immaterial whether it was the 11th of August, or the 17th of July before she got into dock. Thirdly, The court considered the legal consequence of such a state of facts (as established by *Case v. Davidson*, *supra*, and a case in your lordships' house arising out of this very transaction, *Stewart v. Greenock Marine Insurance Company*, *supra*) to be, that freight accruing due after the 11th of August (which includes all the freight of the ship), belonged, not to the owners, but to the insurers of the ship, and so was lost to the owners. Fourthly, The court held that the cause of this loss of freight to the owners was the loss of the ship by perils of the sea, and so the freight was lost by one of the perils insured against.

These are the grounds on which the Court of Session proceeded. But with all respect to the distinguished persons by whom these judgments were pronounced, I think they rest on an unsound foundation. I do not think that, as between the parties in this cause, it can be said that the ship was totally lost during her voyage. That she was not in fact lost, is certain, for she arrived at Liverpool, was there brought into dock,

\*her cargo was safely delivered to the consignees, and the freight was paid to the owners. But how, then, it may be said, is this [\*924] consistent with the verdict of the jury in the action against the underwriters of the ship, which finds expressly that the vessel was a total loss, irrespective of the decayed timbers and deficient sails? To this I answer, that the verdict was altogether *res inter alios acta*. As between the underwriters on the ship and the assured, it might be proper to treat the damage as a total loss. But it does not therefore follow, that it can be so treated as between the owners and other persons—as between the owners, for example, and the underwriters of the freight. When it is said, that as between the owners and the underwriters of the ship, there had been a total loss, all that is meant is, that the circumstances of the case were such as gave to the owners the same rights against the insurers of the ship as if there had actually been a total loss. It does not by any means follow, that the same circumstances will give to the owners similar rights against other persons. When the cargo was delivered to the consignees, and the freight paid, the owners might, if they had thought it for their interest, have retained the damaged vessel, and come on the insurers for the cost of repairing her, or for a due proportion of that cost. In such a case, there could have been no possible claim on the appellants, the underwriters of the freight; their contract would have been performed. How can the right of the owners to enforce against third persons, claims resting on what is in truth a fiction, (namely, the assumption that the ship did not perform her voyage,) give them any right against those whose contract was actually performed?

The learned judges in the Court of Session seem to doubt whether the contract of the underwriters on the freight was performed—whether the sum paid to the owners by the consignees, on delivery of the cargo at Liverpool, could be treated as freight—whether it was not rather to be regarded as in the nature of salvage, paid indeed to the owners, but paid to them only as agents of the underwriters on the ship. With all respect, I do not think there is any ground for such a doubt. The sum paid to the owners by the consignees was due for freight, and for nothing else; and if payment had been withheld, there can \*be no doubt [\*925] but that an action could have been maintained by the owners for freight immediately on delivery of the cargo. None but the owners could have maintained such an action, and they could maintain it only by virtue of their original contract of freightment. What the underwriters on the freight undertook was, that the voyage should be so performed, as that the owners should be able to deliver the cargo, and so be in a condition to assert their title to freight, and this state of things actually occurred.

It is true that the Court of Session first, and afterwards this house, in the action by the underwriters on the ship against the owners, decided, that the sums paid for freight were paid to the owners, not for their own benefit, but for the use and behoof of the insurers; and it was strongly contended at your lordship's bar, that the contract into which the appellants, the underwriters on freight, entered with the owners, was, that the voyage should be so performed as to entitle the owners to recover the

freight for their own use, and not merely as agents or trustees for others. The decision in the action by the owners against the insurers of the ship, has been, that, under the circumstances, the freight was due, not to the former, but to the latter, and so, it was said, the contract of the underwriters on the freight was not performed. But this reasoning rests on a fallacy. The underwriters on the freight engaged, that the ship should not be prevented by perils of the sea from enabling the owners to earn her freight. Nor was she so prevented, for, in spite of those perils, she arrived in port under the conduct of the owners, and obtained payment of her freight. The right of the underwriters to claim that freight against the owners, arose not from perils of the sea, but from the election made by the owners, after the freight had been earned and paid to them, to treat the ship as wholly lost on or before the 11th of August.

Where a ship has received such an injury as entitles the owner to treat it as totally lost, and the owner consequently abandons it to the underwriters, they, if they repair and navigate her, come in as assignees, and so are entitled to all freight afterwards earned. In such a case, the owner has been compelled by perils of the sea to abandon the ship, and so he loses, not only the ship, but all possibility of earning freight.

[\*926] \*It was to this state of circumstances, that Chief-Justice Tindal refers in *Chapman v. Benson*, 6 Man. and Gr. 792, where he says—"The assured has sustained a total loss of the freight if he abandons the ship to the underwriters on ship, and is justified in so doing; for, after such abandonment, he has no longer the means of earning the freight, or the possibility of ever receiving it if earned, such freight going to the underwriters on ship." But there the very learned chief-justice was referring to what was then treated as a total loss, and abandonment to the underwriters before the freight was earned. The distinction between the cases of *Benson v. Chapman*, according to what were supposed in the Court of Common Pleas to be the facts, and the present case is, that there, before any freight had been earned, there had been a damage so serious as to justify the owner in treating it as a total loss, and abandoning the ship to the underwriters; whereas here the owner remained in actual possession till after the freight had been earned, and earned by reason of the ship having actually performed the voyage in question.

I do not apprehend that there is any doubt as to the soundness of the doctrine laid down by Chief-Justice Tindal, though the judgment of the Court of Common Pleas was reversed by the exchequer chamber, and that reversal was afterwards sustained by this house. That reversal proceeded on the ground, not that the views of the chief-justice were erroneous, if the facts had been such as they were supposed to be in the court below before the facts had been put on the record in the form of a special verdict, viz., that there had been a total loss and abandonment; but because it was considered, that the facts found in the special verdict did not show that there had been a total loss and abandonment, so that the principles laid down by the chief-justice were inapplicable. But then it was argued at your lordships' bar, that here the circumstances are precisely those to which the chief-justice referred, and on which he relied, namely, an abandonment to the underwriters on the ship, in consequence



of an injury so serious as to have justified such an abandonment. This, it was said, was a total loss, and so the doctrine of the chief-justice, that there was a total loss of freight, as well as of ship, is strictly applicable. There is, \*however, a manifest and most important difference [\*927] between the case on which Chief-Justice Tindal was reasoning, and the present. The chief-justice was referring to a case of loss and abandonment during the course of the voyage, and before the freight had been earned. Here, though, according to the verdict, the ship was totally lost, yet there was no abandonment till after she had arrived in port, and till the owners were in a condition to insist on payment of the freight, and until that freight had been paid to them. In such a state of things, I concur in what was said by Mr. Baron Alderson, when he delivered in this house the opinion of the judges in *Benson v. Chapman*, 2 H. of L. C. 721. His words are—"Nor, indeed, is there any instance to be found in which an action for a total loss of freight has been held to be maintainable, where the freight has been actually earned." The court below appears to me to have fallen into an error by overlooking this distinction. Whatever might be the rights of the owners as between themselves and the insurers of the ship, it could not possibly be competent to them, after the freight had been earned, to make an election which should affect the interests of third parties.

I am not aware, indeed, of any previous case in which, after a ship had actually performed her voyage, the owners have been permitted, even between themselves and the underwriters on the ship, to treat an injury sustained on the voyage, as a total loss, abandoning the ship to the underwriters after her arrival in port; and I observe that the lord chancellor, in moving the judgment of this house in *Stewart v. The Greenock Marine Insurance Company*, where the question was, who, as between the owners and the underwriters on the ship, were entitled to the freight earned, cautiously abstains from giving any opinion on the point, whether there had been what could justly be treated as a total loss. His lordship's judgment, indeed, proceeds on the assumption that such was the case; but then he says expressly, "The facts as found by the verdict must be the ground on which the consideration of the question must proceed;" and again, "The verdict finds, first, that there was a total loss of the *Laurel*;" and then, proceeding on the ground, that, as between the then parties, namely, the owners and the \*insurers on the ship, there [\*928] had been what the verdict had conclusively established to be a total loss, he considers what, as between those parties, were the rights in respect of the freight. That was the sole question then before your lordships, and the decision then come to does not govern a case where the parties are different, and where it is open to the party sought to be charged, to contend that, as against him, there cannot be said to have been that total loss, the existence of which was the foundation of the former decision.

On the ground, therefore, that here the freight insured was actually earned and received by the owners, and that, but for their act after such earning and receipt, they might have retained it for their own use—so that the contract into which the appellants entered was strictly per-

formed—I have come to the conclusion that the judgment below was erroneous, and I therefore move your lordships that it be reversed.

LORD TRURO.—My lords, I concur in the conclusions to which my noble and learned friend has arrived, that the judgment which was pronounced in the court below is erroneous, and ought to be reversed. And in stating my reasons for coming to that conclusion, I shall be under the necessity, I fear, of repeating much which the lord chancellor has just addressed to your lordships. The opinion which he has delivered to your lordships appears to me to have contained all that is essentially material to the case; and, except that the case is one of considerable importance, I should have been well content to have rested entirely upon the reasons which the noble lord has given. I think they are perfectly sound. I am satisfied that they are consistent with every previous decision, except that which is now the subject of appeal, and that they furnish abundant ground for your lordships to reverse the judgment according to the prayer of the appellants. But, my lords, I pray your lordships' indulgence, while I state, or rather to some extent repeat, the reasons which have induced me to form the opinion I am now expressing.

Your lordships are rightly told, that in this case the assured upon a policy for freight claims to recover the total loss upon that policy, not by [929] reason that the freight has been actually \*lost, but by reason that the assured, who has received the freight, is not entitled to retain it for his own use. The case of the respondents, as appears upon the record is, that the freight has been earned, has been received, and the assured, by reason of certain circumstances, has been compelled to allow the underwriters upon the ship the freight so earned and so received, in an account by way of set-off against the subscription, the amount of which he claims to be entitled to receive.

It appears, as your lordships have heard, that this ship sailed from Quebec on the 14th of July. She arrived in the river Mersey, and at the entrance of the Liverpool docks, on the 11th of August. She had been materially damaged on the 27th of July, soon after she sailed from Quebec, by coming in contact with an iceberg, and again sustained considerable damage on the 11th of August, at the entrance into the Liverpool docks. It also appears by the respondents' case that she was afterwards floated into the basin, and on the 12th or 13th of August was floated into the dock, where she was moored, and remained until the next day, when she was put into a graving dock, where she delivered her cargo, and the owner afterwards received freight. Some days after the delivery of the cargo, it appears that the ship was surveyed, and found to be damaged to such an extent as to render her not worth repairing; whereupon the present respondent, the assured, abandoned the ship to the underwriters, and sued them for a total loss and recovered; but the court, in determining the amount which the pursuer was entitled to recover, decided that the underwriters were entitled to credit for the amount of the freight which the pursuer had received, against the amount of their subscriptions. And the assured, being thus compelled to allow, in an account with the underwriters in the settlement of the loss, the amount of freight, instituted the present suit against the underwriters upon the

freight, insisting, that because he was so compelled to allow the freight actually received, to the underwriters of the ship, there had been, within the meaning of the policy, a total loss of freight. And the question now before your lordships is, whether, because the underwriters upon the ship were so entitled, which this house has decided they were, to the amount of freight, \*that, in point of law, constitutes a total loss of freight within the meaning of the policy. [\*930]

My lords, I own it appears to me that the assured's right of abandonment and recovery of a total loss against the underwriters upon the ship, has been determined under circumstances somewhat peculiar. The ship, as my noble and learned friend has stated to your lordships, actually performed the voyage—a circumstance which, as far as I am aware, has never occurred where the owner has been held entitled to abandon the ship, and claim for a total loss, however extensive the damage may have been which was incurred during the voyage. In the cases in which abandonment has hitherto been allowed, the voyage has either been actually lost, or the ship has been placed in circumstances, by the perils insured against, in which no prudent owner, uninsured, would do that which has become necessary to enable the ship to perform the voyage. In some of the cases, ships have been under capture or detention by hostile powers, or stranded, attended with uncertainty whether the ship could ever be got off in a situation able to prosecute the voyage, or so damaged at an intermediate port, as to be either irreparable altogether by reason of her own condition, or for want of the necessary means of repair, or requiring an outlay to enable her to pursue her voyage, such as no prudent owner uninsured would incur. In all these cases, at the time of the abandonment, either the voyage was lost, or in imminent peril of being so. But, as before stated in this case, though the damage was incurred during the voyage—that is, before she had delivered her cargo in the Liverpool dock—yet that damage did not prevent her from completing her voyage by delivering her cargo and earning the freight. That the underwriters of the ship were liable to indemnify the owner for the pecuniary damage which he would sustain by the outlay necessary to repair the injuries which the ship had received, is quite clear; but the decision by which the right to abandon and recover a total loss was established, appears to me to be somewhat in advance of the previous decisions.

The case, the nearest in point of circumstances, and which were referred to by my Lord Cottenham, in moving the judgment of the house, is that of *Samuel v. Royal Exchange Assurance Company*, supra. That ship was insured to the port of London, and was ultimately destined to deliver her cargo in the king's dock at Deptford. She arrived at the dock gates, but, before entering the dock, was there totally lost, and, of course, thereby prevented from completing her voyage, which she never did complete. The plaintiff was held entitled to recover for a total loss, but only upon the ground that she was lost during her voyage,—that is, before she was moored at the place of her ultimate destination, and her voyage thereby completed. But, as before stated, in the present case, though the damage was during the voyage, the ship was not thereby prevented from completing her voyage. It does not appear to me that,

provided the loss occurs during the voyage, it is at all material whether that loss happens a short time after the inception of the risk, or a short time before the voyage is completed. From the commencement to the termination of the risk, the effect of the loss is the same, inasmuch as the loss during any portion of that interval, is equally a loss at whatever time it may occur during the voyage.

In the action against the underwriters on this ship, the jury found facts, which must be coupled with facts admitted upon the record. This, I think, has been much overlooked—it being a clear principle of law, that that which the parties admit upon the face of the record, the jury even cannot gainsay. It is not within the issue left to them. Their verdict, therefore, must always be construed with reference to the facts admitted upon the face of the record. The verdict in this case, taking it in its terms, coupled with the facts admitted upon the record, shows that the ship, although so damaged as not to be worth repairing, had yet performed her voyage. The verdict is certainly not quite so distinct upon some of the material facts, as we are accustomed to see verdicts in the English courts. But the terms of that verdict, being taken in connection with the facts admitted upon the record to which that verdict would be appended, and upon which the interlocutor or judgment was pronounced—the facts distinctly appear, that the damage sustained by the ship, either by coming in contact with the iceberg, or at the pier-head, did not prevent her afterwards being floated into the basin, and [\*932] subsequently into the dock where she was moored, and from which, on the following day, she was taken into the graving dock, and there discharged her cargo. It further appears, that some days after this the ship was surveyed. It was at first reported, that the cost of repairing her would be £3000; it was afterwards estimated that it would exceed £4000,—the ship having been valued in the policy at £7500. Further, it appears that the freight, as before stated, actually earned and paid to the owners, amounted to £1402, 2s. 2d., which is the amount sought to be recovered on the policies on freight. So that the verdict, properly construed with reference to the other facts admitted upon the record, and by which the parties are conclusively bound, shows that the damage sustained by the ship did not prevent her from completing her voyage, and earning her freight.

These are facts necessary to be attended to in proceeding with the inquiry as to the rights of the parties in the present case. In order to determine whether those facts constitute a loss of freight within the meaning of the policy on freight, it is necessary to consider what are the obligations which the underwriter takes upon himself by that policy. My noble and learned friend, I think, has stated them most correctly. I conceive that the underwriter upon the freight binds himself to indemnify the assured against any loss of freight occasioned by the ship being prevented from performing the voyage insured, by any of the perils mentioned in the policy, and thereby the freight insured being earned. He does not engage that the assured should be able to procure a loading, or that he should be entitled to retain the freight, as between him and any other persons, after it shall have been earned. I understand

his liability to indemnify against the loss of freight is limited to a loss occasioned by the ship's being prevented from performing the voyage insured, by any of the perils within the policy. With a loss of freight sustained from any other cause, or by any other means than the incapacity of the ship to perform the voyage and earn the freight, I do not understand the underwriter is at all concerned.

In *Benson v. Chapman*, 2 H. of L. C. 696, which was a case relied upon by the pursuer, Mr. Baron Alderson, in delivering the opinion of the judges to your lordships' house, expressly \*stated, that there was no case in which it had been held there was a loss of freight, [\*933] where the voyage had been performed, and the freight had been earned, and that the underwriters engaged only that freight should be earned, and it had been earned. I own, my lords, it struck me with some surprise that that case should be stated, and that principle distinctly enunciated; but yet no answer, that I can see, is to be found in any part of the argument below, and none has been stated at your lordships' bar, which can in any respect impeach the soundness of that general principle which the learned baron pronounced in delivering the opinion of the judges. No case has been cited, and I believe none can be cited, inconsistent with that doctrine. It is correctly stated, that the decision of the Court of Common Pleas was upon the distinct ground that the voyage had been lost,—that is to say, that the ship had been reduced to such a state of damage by the perils insured against, as that she could not be put into a condition to perform the voyage without an outlay such as no uninsured prudent owner would incur. The owner, in order to save the underwriters, would not be bound to do that greatly to his injury, which he would do if uninsured, and therefore, in that respect, he was entitled to abandon the ship. And when he abandoned the ship, he of course would be entitled to nothing which the future owner of the ship might earn by means of the ship, which, though once belonging to the original owner, had ceased to be so by the effect of the abandonment, justified by the consequences of those perils against which he had insured. That judgment, it is true, was reversed by the exchequer chamber, the reversal being sustained by this house; but nobody, that I am aware of, uttered a word tending to impugn the correctness of the law which had been laid down in the Court of Common Pleas. It was argued in the Court of Common Pleas upon a special case—that is, a statement of facts agreed to by the parties. That special case stated, that certain circumstances had occurred to the ship, the parties leaving it to the court to say whether those circumstances amount to a total loss or not. But when they bring a writ of error to review the judgment, it is then necessary that that special case, with the statement of the circumstances, should be altered so as to state \*the conclusion of fact to which those [\*934] circumstances lead. The court, in hearing the argument upon the special case, in the first instance draw the conclusion of fact as if they were a jury; but when it goes to a court of error there is no license to the Court of Error to draw a conclusion of fact; they can only deal with the facts actually recorded. In the Court of Common Pleas the court inferred that there had been a total loss. When the facts with

the conclusions came to be drawn out into the form of a special verdict, the fact was stated, that no prudent owner would have incurred the expense which was necessary to repair the ship; but the record did not state, that the ship being at Pernambuco, and the owner in England, no prudent owner would have incurred the expense, if he had been at Pernambuco—in other words, the captain upon the spot having been induced to repair, exercising his best judgment in regard to the facts—the case, in stating that no prudent owner here would have incurred the expense, did not state, that a prudent owner upon the spot, aware of the facts which the captain was aware of, would not have repaired. The Court of Error said, therefore, We cannot say that a prudent owner at Pernambuco would not have repaired, merely because you tell us a prudent owner in England would not have repaired. The captain stood in the place of the owner, and therefore you must give us that conclusion of fact, placing the owner in the situation in which the captain was placed; and unless the verdict states that no prudent owner at Pernambuco would have incurred the expense, we cannot say that the owner was authorized to abandon the ship, because it is only on the footing, that no prudent owner, in the circumstances in which he is supposed to be placed, would incur the expense, that he is entitled to abandon her. The judgment, therefore, was reversed, because the Court of Error could not draw that conclusion of fact upon the special verdict, which the Court of Common Pleas had drawn upon the special case, the law being perfectly unimpugned, either in the Court of Exchequer Chamber, or at the bar of this house. The case, therefore, was ultimately determined upon the ground, that there did not appear to have been such a constructive total loss upon the ship as to warrant the owner in abandoning her.

[\*935] \*Now, my lords, if the true construction of the policy, or, in other words, the obligation of the underwriters upon the freight, be what the noble lord has stated, and what I have in other terms repeated, the facts of this case appear to be conclusive against the claim of the respondent. As I before stated, it appears by the record, that the voyage was performed notwithstanding the injuries which the ship received, and the freight was not only earned, but also received. The decision against the underwriters below, however, was founded upon a different view of the effect of the policy, and it becomes necessary to examine the correctness of the construction so adopted, and the application of that construction to the facts of this case.

The expression, “the loss of freight,” has two meanings, and the distinction between them, and its effects, it is material to bear in mind. Freight may be lost in the sense, that, by reason of the perils insured against, the ship has been prevented earning freight—that is the sense in which it has been lost in this case. Or you may use the expression, “loss of freight,” in the sense, that it may be lost to the owner, after it has been earned, by some circumstances unconnected with the contract between the assured and the underwriters on the freight. For a loss of freight in the first sense, that is, the ship being prevented earning the freight by the non-performance of the voyage insured, the underwriter on the freight is liable. But for any loss of freight sustained by the

owner after it has been earned, I conceive the underwriter is not liable. I can extract no obligation whatever from the policy, which should subject him to such a loss. He has performed his warranty by the freight being earned, and he has no concern whatever with who may be entitled to the freight when so earned.

In this case, at the time the owner received the freight, he so received it on his own account, for his own benefit, and, as the facts then stood, was entitled to retain it against all the world. The contract between the owner and the underwriters on freight had been entirely performed, and the relation between them determined, and the assured was at that time entitled, not only to retain the freight, but to recover a full \*compensation for any pecuniary loss he might have incurred [\*936] by reason of the damage which his ship had sustained. But having valued his ship at £7500, and the cost of the necessary repairs of the damage being £4000 only, he preferred to claim a total loss and to abandon the ship, and thereby obtain £7500, rather than to claim a partial loss, by which he would be entitled to recover only his actual damage of £4000, retaining at the same time his ship; and the consequence of his electing to take that course, was to make the freight, which he had received for his own benefit, an item in account between him and the underwriters of the ship, and upon that he founds a claim to a total loss of freight against the now appellant. The act of abandonment, if it did not operate as an assignment of the ship, at least enured as a binding agreement to assign it, and thereby invested the underwriter on the ship with all the rights which belonged to him as owner, among which rights, it is said, was that of having the benefit of the earnings of the ship during the voyage—the assignment by abandonment, as I call it, being supposed to entitle the underwriter to all the profits which had arisen throughout the voyage. If the ship had been uninsured, this question could never have arisen. But it is said, that although, if the owner had stood his own insurer, there would have been no loss, yet, by reason of his having thought fit to make a contract of insurance with others, and afterwards to constitute those insurers, owners of the ship in his place, the underwriters on the freight have been guilty of a breach of their contract by not indemnifying him for what he calls loss of freight arising out of his having invested the underwriter of the ship with his title to the freight actually earned. I think such a claim is not founded in law or in justice. If uninsured, there could have been no pretence of loss, but, if insured, the amount of claim against the underwriter of the freight is, according to the argument of the respondent, to vary according to the proportion in which the assured happens to have insured the ship.

Besides, what has been the effect of the judgment in the court below? In substance, to make the underwriter of the freight an insurer of the ship. Hitherto his liability has been to answer for the loss of freight, provided the owner is \*prevented by the perils insured against [\*937] from earning freight. But, according to the decision, freight may be earned, the underwriter upon the freight may have performed his duty, the ship may afterwards be lost in consequence of perils pre-

viously incurred, and, by reason of such loss of the ship, the underwriters upon the freight become liable. What does he receive premium for? That the owner may be able to earn the freight, notwithstanding the perils of the sea and the perils of navigation. He knows that the ship may receive such damage as not to be able to perform the voyage, but the goods may be carried forward and the freight earned. He knows that the insurance upon the ship may be made to last longer than the insurance upon the freight. Look at the form of the policy in question, which is, that the insurance is to last until ten days after the report of the custom-house of the ship. So that, the ship having arrived and delivered her cargo, the freight earned and paid—if the ship sinks within the time of the insurance of the ship—that sinking resulting from perils which had been incurred, before the underwriter is to be answerable for the loss of freight, because the ship had been lost after the freight had been earned. My lords, his premium is not measured by any such degree of risk—it is not within the terms of his contract—it is not within the spirit of his contract—and, I think, not within the terms of the policy.

Some question is raised in this case in regard to the necessity of an abandonment, and it is said, that if an abandonment was unnecessarily made, it ought not to affect the rights of the parties. My lords, I own I am clearly of opinion that abandonment was at all events essential in this case to entitle the assured to recover for a total loss. Whether, where a ship continues to exist in specie, the assured can ever recover for a total loss without abandonment, it is not necessary to consider, because I think that in this case no doubt can be reasonably entertained but that it was competent to the assured, as my noble and learned friend has stated to your lordships, to retain his damaged ship, and to recover the £4000, enabling him to repair, or any other sum of money which he might expend in order to repair the damage which the ship had sustained. The underwriters, if the assured had thought fit to claim his indemnity [\*938] \*as for a partial loss, could have had no pretence to claim any interest in the damaged ship. The option rested entirely with the assured, either to abandon the ship and claim a total loss, or to repair his ship and claim the partial loss. It does not always become necessary, but the course is, where it does become necessary, for the assured, upon the abandonment, to assign the ship to the underwriters, as was done in the class of cases which your lordships will recollect, arising out of the Russian embargo. In that case, the ships being under embargo, and it being uncertain whether they would be deemed to be captured or released, in order to put the underwriters in the perfect situation of owners, you find by the reported cases that assignments were generally taken when the abandonment was made, or soon after. Therefore the option rested with the assured, either to abandon and to claim a total loss, or to repair his ship and claim a partial loss; and unless he had declared his election within a reasonable time after he had become acquainted with the state of his ship, he would have waived his right of election, and his claim would have been confined to a partial loss. The title of the underwriter on the ship to the freight, was not founded upon the policy, or upon the



extent of the damage which the ship had sustained, but upon the election of the assured to abandon, that is, to assign his ship to such underwriter. And a doctrine which leads to this, that an arrangement between the assured and the underwriter upon the ship will render an underwriter upon the freight liable to pay a total loss upon the freight in relief of the underwriter upon the ship, and that in a case where the freight has been actually earned and received, I say such a doctrine as that should be watched with great jealousy. Wherever a ship is so circumstanced, as that the assured has an election to treat it either as a total loss or a partial loss, I conceive abandonment is a condition to be performed either prior to, or contemporaneously with, his claim of total loss. And I can see no just ground for doubting that this was at least a case of election, assuming, as I have before stated, that such an election exists, after the voyage has been actually performed. The cases in the books in which it is said, that where it is in the option of the assured to claim as for a total or a partial \*loss, abandonment is necessary to be made within a reasonable time, in order to support an election to treat [939] the loss as a total loss, are too numerous and too well known to make it necessary for me to fatigue your lordships by referring to them by name.

It appears to me, therefore, upon principle that the judgment which has been pronounced in this case is erroneous, and decidedly at variance with the legal result of the whole record, which shows an ordinary insurance for freight, the voyage performed, and the earning of freight not only not prevented by the perils insured against, but actually accomplished, and the freight actually received by the owner at a time when he might have retained it for his own benefit, except for his subsequent voluntary election to constitute the underwriters on the ship, as between him and them, the owners of the ship, and thereby transfer his previously vested right to the freight so earned, to them—circumstances negating any breach of the contract on the part of the underwriters upon the freight, that the vessel should not be prevented from performing the voyage insured, and thereby entitling the owner to the freight in consequence of any of the perils mentioned in the policy.

In *Thompson v. Rowcroft*, supra, it is said, that underwriters on the ship stand in the place of the owner after abandonment; and in *Case v. Davidson*, 5 Maule and Selwyn, 79, Lord Tenterden says—"Abandonment is equivalent to a sale." There are numerous authorities to the same effect. I think there is no authority in support of the plaintiff's claim, but there is authority very strong in opposition to it. In illustration of the effect of a policy on the freight, the case of *Everth v. Smith*, supra, may be referred to, by which it was decided, that such a policy was not an insurance on specific freight, but on the freight generally, and that, if any freight was brought home, no loss would happen for which the underwriter was liable. *Macarthy v. Abel*, supra, seems to me directly in point, and was referred to and adopted in *Everth v. Smith*. There were insurances in that case on both ship and freight. The ship had been detained by the Russian Government at Riga, and the cargo taken out, and, while in that state under detention, there was

[\*940] an abandonment of ship and freight to the respective \*underwriters, all of whom paid the owner for a total loss. The ship, however, was afterwards released, delivered her cargo, performed the voyage, and the underwriters on the ship received the freight; whereupon the assured brought an action on the policy on the freight for a total loss. Lord Ellenborough, in giving judgment in that case, said—"The case resolves itself into a single point, viz., whether the freight had been in this case lost or not? If the fact be merely looked at, freight, in the events which have happened, has not been lost, but has been fully and entirely earned, and received by or on behalf of the plaintiffs, the assured, and if so, no loss can be properly demandable against the underwriters on the freight, who merely insure against the loss of that particular subject by the assured. But if it have, or can be considered as having been in any other manner or sense lost to the owners of the ship, it has become so lost to them, not by means of the perils insured against, but by means of an abandonment of the ship, which abandonment was the act of the assured themselves, with which, therefore, and the consequences thereof, the underwriters on freight have no concern. It appears to us, therefore, that *quacunque via data*—that is, whether there has been no loss at all of freight, or, being such, it has been a loss only occasioned by the act of the plaintiffs themselves—they are not entitled to recover, and therefore a nonsuit must be entered." My lords, that appears to me to be a distinct authority upon the present case; and although the attention of the learned counsel at the bar was called to the case, undoubtedly it has received no answer. Nothing has been said to impugn the doctrine there laid down, nor any distinction pointed out with reference to its just application to the present case.

It is also to be observed, that there is no case showing underwriters entitled to the freight by reason of there having been a total loss, except where there has been an abandonment, which I own I should have expected it would have been thought necessary to produce evidence of in sustaining the present argument. I repeat, that there is no case in which the underwriters of a ship have ever been held entitled to the freight, except where there has been an abandonment.

[\*941] The case has been argued with great learning and ability by \*the judicial authorities in Scotland, and ample justice has been done to the case by very able and learned arguments at the bar,—though there are some principles which have been stated, which were new to me, and which I think, upon examination, would be found to be erroneous. I feel bound to state, with every respect for a contrary opinion, that it is clear to my mind that there has been no loss of freight in this case within the meaning of the policy. I therefore concur in the opinion which has been pronounced by the noble and learned lord, and I think your lordships are bound in point of law to allow this appeal, and to reverse the decision of the court below.

Interlocutors reversed.

Whatever difficulty may be thought to have attached to the previous case of *Stewart v. The Greenock Insurance Company*, there does not appear to be much difficulty in the subsequent one of *Turner v. Scottish Marine Insurance Company*, which last was the sequel of the former one. In a question as between the owners and the underwriters on the freight it seems impossible to hold that the latter were liable for the loss of the freight, seeing that the freight was not lost but earned. The freight was no doubt lost to the owners, but that arose from an act of their own in abandoning the vessel to the underwriters on it, and in suing as for a total loss. A loss of the freight from that cause cannot be supposed to have been contemplated by the underwriters on the freight. Their obligation was to indemnify the owners for the freight if lost from the perils of the sea. The freight, however, was not so lost, but, on the contrary, was earned and paid to the owners, and by them paid to the underwriters on the ship as a consequence of their having abandoned the ship, and claimed as for a total loss.

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# AN ACT

TO

AMEND THE LAWS OF ENGLAND AND IRELAND AFFECTING TRADE AND COMMERCE.—29TH JULY, 1856.

ANNO DECIMO NONO ET VICESIMO VICTORIÆ REGINÆ.

CAP. XCVII.

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WHEREAS inconvenience is felt by persons engaged in trade by reason of the laws of England and Ireland being in some particulars different from those of Scotland in matters of common occurrence in the course of such trade, and with a view to remedy such inconvenience it is expedient to amend the laws of England and Ireland as hereinafter is mentioned: Be it enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:—

I. No writ of *Fieri Facias* or other writ of execution, and no writ of attachment against the goods of a debtor, shall prejudice the title to such goods acquired by any person *bona fide*, and for a valuable consideration before the actual seizure or attachment thereof by virtue of such writ; provided such person had not, at the time when he acquired such title, notice that such writ, or any other writ by virtue of which the goods of such owner might be seized or attached, had been delivered to and remained unexecuted in the hands of the sheriff, under-sheriff, or coroner.

[\*944] \*II. In all actions and suits in any of the superior courts of common law at Westminster or Dublin, or in any court of record in England, Wales, or Ireland, for breach of contract to deliver specific goods for a price in money, on the application of the plaintiff, and by leave of the judge before whom the cause is tried, the jury shall, if they find the plaintiff entitled to recover, find by their verdict what are the goods in respect of the non-delivery of which the plaintiff is entitled to recover, and which remain undelivered; what (if any) is the sum the

plaintiff would have been liable to pay for the delivery thereof; what damages (if any) the plaintiff would have sustained if the goods should be delivered under execution, as hereinafter mentioned, and what damages if not so delivered; and thereupon, if judgment shall be given for the plaintiff, the court or any judge thereof, at their or his discretion, on the application of the plaintiff, shall have power to order execution to issue for the delivery, on payment of such sum (if any) as shall have been found to be payable by the plaintiff as aforesaid, of the said goods, without giving the defendant the option of retaining the same upon paying the damages assessed; and such writ of execution may be for the delivery of such goods; and if such goods so ordered to be delivered, or any part thereof, cannot be found, and unless the court, or such judge or baron as aforesaid, shall otherwise order, the sheriff, or other officer of such court of record, shall distrain the defendant by all his lands and chattels in the said sheriff's bailiwick, or within the jurisdiction of such other court of record, till the defendant deliver such goods, or, at the option of the plaintiff, cause to be made of the defendant's goods the assessed value or damages, or a due proportion thereof; provided that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have made of the defendant's goods the damages, costs, and interest in such action or suit.

III. No special promise to be made by any person after the passing of this act to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized, shall be deemed invalid to support \*an action, suit, or other proceeding to charge [§945] the person by whom such promise shall have been made by reason only that the consideration for such promise does not appear in writing or by necessary inference from a written document.

IV. No promise to answer for the debt, default, or miscarriage of another made to a firm consisting of two or more persons, or to a single person trading under the name of a firm, and no promise to answer for the debt, default, or miscarriage of a firm consisting of two or more persons, or of a single person trading under the name of a firm, shall be binding on the person making such promise in respect of anything done or omitted to be done after a change shall have taken place in any one or more of the persons constituting the firm, or in the person trading under the name of a firm, unless the intention of the parties, that such promise shall continue to be binding notwithstanding such change, shall appear either by express stipulation, or by necessary implication from the nature of the firm or otherwise.

V. Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the cre-

ditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding, at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him : provided always, that no [\*946] co-surety, co-contractor, or \*co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable.

VI. No acceptance of any bill of exchange, whether inland or foreign, made after the 31st day of December, 1856, shall be sufficient to bind or charge any person, unless the same be in writing on such bill, or, if there be more than one part of such bill, on one of the said parts, and signed by the acceptor or some person duly authorized by him.

VII. Every bill of exchange or promissory note drawn or made in any part of the United Kingdom of Great Britain and Ireland, the Islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them, being part of the dominions of her majesty, and made payable in or drawn upon any person resident in any part of the said United Kingdom or islands, shall be deemed to be an inland bill; but nothing herein contained shall alter or affect the stamp-duty, if any, which, but for this enactment, would be payable in respect of any such bill or note.

VIII. In relation to the rights and remedies of persons having claims for repairs done to, or supplies furnished to or for, ships, every port within the United Kingdom of Great Britain and Ireland, the Islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them, being part of the dominions of her majesty, shall be deemed a home port.

IX. All actions of account or for not accounting, and suits for such accounts, as concern the trade of merchandise between merchant and merchant, their factors or servants, shall be commenced and sued within six years after the cause of such actions or suits, or when such cause has already arisen then within six years after the passing of this Act; and no claim in respect of a matter which arose more than six years before [\*947] the commencement of such action or suit shall be enforceable by \*action or suit by reason only of some other matter of claim comprised in the same account having arisen within six years next before the commencement of such action or suit.

X. No person or persons who shall be entitled to any action or suit with respect to which the period of limitation within which the same shall be brought is fixed by the Act of the twenty-first year of the reign of King James the First, chapter sixteen, section three, or by the Act of the fourth year of the reign of Queen Anne, chapter sixteen, section seventeen, or by the Act of the fifty-third year of the reign of King

George the Third, chapter one hundred and twenty-seven, section five, or by the Acts of the third and fourth years of the reign of King William the Fourth, chapter twenty-seven, sections forty, forty-one, and forty-two, and chapter forty-two, section three, or by the Act of the sixteenth and seventeenth years of the reign of her present majesty, chapter one hundred and thirteen, section twenty, shall be entitled to any time within which to commence and sue such action or suit beyond the period so fixed for the same by the enactments aforesaid, by reason only of such person, or some one or more of such persons, being at the time of such cause of action or suit accrued beyond the seas, or in the cases in which by virtue of any of the aforesaid enactments imprisonment is now a disability, by reason of such person or some one or more of such persons being imprisoned at the time of such cause of action or suit accrued.

XI. Where such cause of action or suit with respect to which the period of limitation is fixed by the enactments aforesaid or any of them, lies against two or more joint debtors, the person or persons who shall be entitled to the same shall not be entitled to any time within which to commence and sue any such action or suit against any one or more of such joint debtors who shall not be beyond the seas at the time such cause of action or suit accrued, by reason only that some other one or more of such joint debtors was or were at the time such cause of action accrued beyond the seas, and such person or persons so entitled as aforesaid shall not be barred from commencing and suing any action or suit against the joint debtor or joint debtors who was \*or were beyond seas at the time the cause of action or suit accrued after his or their return from [\*948] beyond seas, by reason only that judgment was already recovered against any one or more of such joint debtors who was not or were not beyond seas at the time aforesaid.

XII. No part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to any of them, being part of the dominions of her majesty, shall be deemed to be beyond seas within the meaning of the Act of the fourth and fifth years of the reign of Queen Anne, chapter sixteen, or of this Act.

XIII. In reference to the provisions of the Acts of the ninth year of the reign of King George the Fourth, chapter fourteen, sections one and eight, and the sixteenth and seventeenth years of the reign of her present majesty, chapter one hundred and thirteen, sections twenty-four and twenty-seven, an acknowledgment or promise made or contained by or in a writing signed by an agent of the party chargeable thereby, duly authorized to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself.

XIV. In reference to the provisions of the Acts of the twenty-first year of the reign of King James the First, chapter sixteen, section three, and of the Act of the third and fourth years of the reign of King William the Fourth, chapter forty-two, section three, and of the Act of the sixteenth and seventeenth years of the reign of her present majesty, chapter one hundred and thirteen, section twenty, when there shall be

two or more co-contractors or co-debtors, whether bound or liable jointly only, or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor or administrator shall lose the benefit of the said enactments or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money, by any other or others of such co-contractors or co-debtors, executors or administrators.

[\*949] \*XV. In order to enable the superior courts of common law at Westminster and Dublin, and the judges thereof respectively, to make rules and regulations, and to frame writs and proceedings, for the purpose of giving effect to this Act, the two hundred and twenty-third and two hundred and twenty-fourth sections of "The Common Law Procedure Act, 1852," shall, so far as this Act is to take effect in England, and the two hundred and thirty-third and two hundred and fortieth sections of "The Common Law Procedure Amendment Act (Ireland,) 1853," shall, so far as this Act is to take effect in Ireland, be incorporated with this Act, as if those provisions had been severally herein repeated and made to apply to this Act.

XVI. In citing this Act it shall be sufficient to use the expression "The Mercantile Law Amendment Act, 1856."

XVII. Nothing in this Act shall extend to Scotland.

1. Formerly the execution creditor of a seller was preferable to the buyer, although the sale took place before the actual seizure of the goods under the writ, if before the sale the writ had been placed in the hands of the sheriff. By section 1, however, it is enacted that a title to goods acquired by a person, *bona fide*, and for a valuable consideration, before the goods have been actually seized or attached, shall not be prejudiced, provided the person acquiring such title had not notice at the time of acquiring it, that a writ of execution or attachment had been delivered to the sheriff, and remained unexecuted in his hands.

2. According to the common law of England a purchaser could not in general enforce specific delivery of the goods sold to him, and his remedy practically resolved itself into a claim of damages, whether he sued specially for non-performance of the contract, or brought an action of *detinue* for the goods themselves, or an action for the conversion of them. By the "Common Law Procedure Act, 1854," 17 and 18 Vict. c. 125, the superior courts at Westminster [\*950] \*had a discretionary power, on the application of the plaintiff, in any action for the detention of any chattel, to order that execution should issue for return of the chattel detained, without giving the defendant the option of retaining the chattel upon paying the value assessed. By the *second* section of the new Act it is provided, that in actions for breach of contract to deliver specific goods for a price in money, the jury, on the application of the plaintiff, and with leave of the judge, are empowered to find by their verdict what were the goods which remained undelivered; also what sum the plaintiff would have been liable to pay for the delivery thereof; also what damages the plaintiff would have sustained if the goods should be delivered under execution, and what damages if not so delivered. The court is then empowered to order execution to issue for the delivery of the goods, on payment of such sum as shall be found to be payable to the plaintiff, without giving the defendant the option of retaining them upon paying the damages assessed.

3. Formerly, in order to make a guarantee effectual, the consideration required to appear on the face of the instrument, either expressly or by clear im-



plication, or from other documents connected with the instrument. (See *supra*, p. 1.) The *third* section enacts that a guarantee shall be valid although the consideration does not appear in writing, or by necessary inference from a written document.

4. The fourth section declares that no guarantee to or for a firm shall be binding after a change shall have taken place in the persons constituting the firm, unless the contrary shall be expressly stipulated, or be necessarily implied from the nature of the firm or otherwise. This is not an alteration, but a declaration of the law as previously laid down, the principle established being, that where a guarantee is given by one firm for advances to be made to another firm, and a change takes place in the position of either firm, the party giving the guarantee is not liable for advances made subsequent to the change in either firm. (See *Bodenham v. Purchas*, 2 B. and Al. 39.)

5. Formerly a surety could not obtain the benefit of such bonds, or judgments, or other securities as were held to be extinguished by the performance by him of the principal obligation, and was entitled only to an assignment of any bond or security by the principal debtor other than those that were so extinguished. By the law of Scotland it was different, for there the cautioner on performing the obligation was entitled to an assignation of the creditor's claim on the principal debtor and the co-cautioners, and of all the securities of every description held by the creditor from or against the principal debtor, provided such securities were not subject to any other claim of the creditor. Section 5 assimilates the law of the two countries in this respect, and a \*surety, [\*951] or co-surety, co-debtor, or co-contractor, who now discharges his liability, is entitled to an assignment of all securities held by the creditor, and may proceed against the principal debtor, or any co-surety, co-contractor, or co-debtor for the advances made, and loss sustained by him, provided that he does not recover from the co-surety, co-contractor, or co-debtor, more than the just proportion for which, as between these parties themselves, he shall be justly liable.

6. In England the acceptances of an inland bill require to be in writing on the bill itself; but a verbal acceptance of a foreign bill, or an acceptance written on a separate paper, or a written or verbal promise to accept an existing foreign bill was held to be a valid acceptance. A promise, however, either written or verbal, to accept a non-existing foreign bill was not sustained, unless the promise had been communicated to the party who took the bill, and he had been induced by the promise to take it. (See vol. i. 434.) Section 6, however, enacts that no acceptance of any bill, whether inland or foreign, shall be sufficient unless it be in writing upon the bill, or if there be more than one part of the bill, on one of the said parts, such acceptance being signed by the acceptor, or some person being duly authorized by him.

7. Section 7 declares that every bill or note drawn or made in any part of the United Kingdom, or the islands there mentioned, and made payable in, or drawn upon any person resident in these places, shall be deemed to be an inland bill, but the stamp-duty payable in respect of such bill or note remains unaffected.

8. By 21 James I. c. 16, it is provided, that all actions of account, and upon the case, *other* than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, must be commenced and sued within six years after the cause of action, and not after. By this provision action is barred as to every item in the account that is more than six years old, and items within that period do not operate to prevent the limitation applying to the previous portion of the account. By section 9 of the present statute the exception in the Statute of James I. is repealed, and now no claim in respect of a matter arising more than six years before the commencement of the suit is enforceable by action or suit, on the ground that some other matter or claim comprised in the same account had arisen within the six years before the commencement of the action.

9. By the same statute, 21 James I. c. 16, it was provided that if any creditor was beyond seas at the time when his cause of action accrued, he should be at liberty to bring his action within the period of limitation after his return from

[\*952] beyond seas; and this exception in favour of creditors \*beyond seas was, by the Act 4 Anne, c. 16, extended to cases where the debtors were beyond seas, so that the creditor might bring his action against such debtor within the period of limitation after his return from beyond seas. In regard also to various simple contract debts, where the creditor was imprisoned, when the cause of action accrued the period of limitation ran only from the time of his being set at large. By the *tenth* section of the present statute a creditor's absence beyond seas, or his imprisonment, is no longer a ground for excluding the limitation of actions, and such creditor is no longer entitled to commence the action beyond the six years, on the ground that at the time his cause of action accrued he was beyond seas or imprisoned. The case, however, of a debtor beyond seas remains as before.

10. By the *eleventh* section, when the cause of action lies against two or more joint debtors, the creditor shall not be entitled to any time beyond the period of limitation within which to commence and sue his action against any one or more of the joint debtors who shall not be beyond seas at the time when the cause of action accrued, on the ground that some other one or more of the joint debtors was or were beyond seas at the time when the cause of action accrued; and his obtaining judgment against the joint debtor within the kingdom shall not be a bar to bringing an action against a joint debtor who was beyond seas when the cause of action accrued, after such joint debtor's return from beyond seas.

11. The operation of the Limitation Statute is barred by acknowledgment or partial payment by the debtor; and questions having arisen as to the proof and effect of acknowledgments and promises offered in evidence, for the purpose to take a case out of the operation of the statute, it was enacted by 9 Geo. IV. c. 14, (Lord Tenterden's Act,) that in actions of debt, or upon the case grounded on any simple contract, no acknowledgment shall be deemed sufficient, unless it be in writing, or by part payment. The *thirteenth* section of the new Act extends these provisions to the case of a debtor's agent, and declares that a written acknowledgment contained in a writing signed by an agent of the party chargeable thereby, who is duly authorized to make such acknowledgment or promise, shall have the same effect as if it had been signed by the party himself.

12. By the Act 9 Geo. IV. c. 14, an acknowledgment made by one contractor did not preserve the claim against other contractors, but part payment by one contractor kept alive the claim against the others. Section 14 repeals this provision as regards part payment by one contractor, and enacts that such part payment shall not prevent another contractor taking the benefit of the Statute of Limitations.

AN ACT  
TO  
AMEND THE LAWS OF SCOTLAND AFFECTING TRADE  
AND COMMERCE.—21<sup>ST</sup> JULY, 1856.

ANNO DECIMO NONO ET VICESIMO VICTORIÆ REGINÆ.

CAP. LX.

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WHEREAS inconvenience is felt by persons engaged in trade by reason of the laws of Scotland being in some particulars different from those of England and Ireland in matters of common occurrence in the course of such trade, and with a view to remedy such inconvenience it is expedient to amend the law of Scotland as hereinafter is mentioned: Be it therefore enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows :—

I. From and after the passing of this Act, where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller, after the date of such sale, to attach such goods as belonging to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser or others in his right from enforcing delivery of the same; and the right of the purchaser to demand delivery of such goods shall from and after the date of such sale be attachable by or transferable to the creditors of the purchaser.

\*II. Where a purchaser of goods who has not obtained delivery thereof, shall, after the passing of this Act, sell the same, [\*954] the purchaser from him or any other subsequent purchaser shall be entitled to demand that delivery of the said goods shall be made to him and not to the original purchaser; and the seller, on intimation being made to him of such subsequent sale, shall be bound to make such delivery, on payment of the price of such goods, or performance of the obligations or conditions of the contract of sale, and shall not be entitled, in any question with a subsequent purchaser, or others in his right, to retain the said goods for any separate debt or obligation alleged to be due

to such seller by the original purchaser : Provided always, that nothing in this Act contained shall prejudice or affect the right of retention of the seller for payment of the purchase price of the goods sold, or such portion thereof as may remain unpaid, or for performance of the obligations or conditions of the contract of sale, or any right of retention competent to the seller, except as between him and such subsequent purchaser, or any such right of retention arising from express contract with the original purchaser.

III. Any seller of goods may attach the same while in his own hands or possession, by arrestment or poinding, at any time prior to the date when the sale of such goods to a subsequent purchaser shall have been intimated to such seller, and such arrestment or poinding shall have the same operation and effect in a competition or otherwise as an arrestment or poinding by a third party.

IV. Nothing hereinbefore contained shall prejudice or affect the landlord's right of hypothec and sequestration for rent.

V. Where goods shall, after the passing of this Act, be sold, the seller, if at the time of the sale he was without knowledge that the same were defective or of bad quality, shall not be held to have warranted their quality or sufficiency, but the goods, with all faults, shall be at the risk of the purchaser, unless the seller shall have given an express warranty of the quality or sufficiency of such goods, or unless the goods have [\*955] \*been expressly sold for a specified and particular purpose, in which case the seller shall be considered, without such warranty, to warrant that the same are fit for such purpose.

VI. From and after the passing of this act, all guarantees, securities, or cautionary obligations made or granted by any person for any other person, and all representations and assurances as to the character, conduct, credit, ability, trade, or dealings of any person, made or granted to the effect or for the purpose of enabling such person to obtain credit, money, goods, or postponement of payment of debt, or of any other obligation demandable from him, shall be in writing, and shall be subscribed by the person undertaking such guarantee, security, or cautionary obligation, or making such representations and assurances, or by some person duly authorized by him or them, otherwise the same shall have no effect.

VII. No guarantee, security, cautionary obligation, representation, or assurance granted or made after the passing of this act to or for a company or firm consisting of two or more persons, or to or for a single person trading under the name of a firm, shall be binding on the granter or maker of the same in respect of anything done or omitted to be done, after a change shall have taken place in any one or more of the partners of the company or firm to which the same has been granted or made ; or of the company or firm for which the same has been granted or made ; unless the intention of the parties that such guarantee, security, cautionary obligation, representation, or assurance, shall continue to be binding, notwithstanding such change, shall appear either by express stipulation, or by necessary implication from the nature of the firm or otherwise.

VIII. When any person shall, after the passing of this act, become

bound as cautioner for any principal debtor, it shall not be necessary for the creditor to whom such cautionary obligation shall be granted, before calling on the cautioner for payment of the debt to which such cautionary obligation refers, to discuss or do diligence against the principal debtor, as now required by law; but it shall be competent to such creditor \*to proceed against the principal debtor and the said cautioner, [\*956] or against either of them, and to use all action or diligence against both or either of them which is competent according to the law of Scotland: Provided always, that nothing herein contained shall prevent any cautioner from stipulating in the instrument of caution that the creditor shall be bound before proceeding against him to discuss and do diligence against the principal debtor.

IX. From and after the passing of this act, where two or more parties shall become bound as cautioners for any debtor, any discharge granted by the creditor in such debt or obligation to any one of such cautioners without the consent of the other cautioners shall be deemed and taken to be a discharge granted to all the cautioners; but nothing herein contained shall be deemed to extend to the case of a cautioner consenting to the discharge of a co-cautioner who may have become bankrupt.

X. From and after the passing of this Act, where any bill of exchange or promissory note shall be issued without date, it shall be competent to prove by parole evidence the true date at which such bill or note was issued: Provided always, that summary diligence shall not be competent on any bill or note issued without a date.

XI. No acceptance of any bill of exchange, whether inland or foreign, made after the thirty-first day of December, one thousand eight hundred and fifty-six, shall be sufficient to bind or charge any person unless the same be in writing on such bill, or if there be more than one part of such bill on one of the said parts, and signed by the acceptor or some person duly authorized by him.

XII. Every bill of exchange drawn in any part of the United Kingdom of Great Britain and Ireland, the Islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them being part of the dominions of her majesty, and made payable in or drawn upon any person resident \*in any part of the said United Kingdom or [\*957] islands, shall be deemed to be an inland bill; but nothing herein contained shall alter or affect the stamp-duty, if any, which but for this enactment would be payable in respect of any such bill.

XIII. From and after the passing of this Act, where any inland bill of exchange shall be presented for acceptance or payment, and the same shall be dishonoured by not being accepted or paid, or where any promissory note shall be presented for payment, and dishonoured by not being paid, it shall not be necessary that a notarial protest shall be taken on such bill of exchange or promissory note, in order to preserve recourse against the drawer or indorser of such bill or promissory note respectively; but it shall be sufficient to prove such presentment and dishonour, to the effect of preserving recourse as aforesaid by other competent evidence, either written or parole: Provided always, that nothing herein contained shall be taken to affect the necessity for a notarial protest, in

order to entitle the holder of any bill or note to proceed with summary diligence thereon.

XIV. Where any inland bill of exchange shall be presented for acceptance or payment, and such acceptance or payment shall be refused, or where any promissory note shall be presented for payment, and payment shall be refused, notice of the dishonour of such bill or promissory note by such refusal to accept or pay shall, in order to entitle the holder to have recourse to any other party, be given in the same manner and within the same time as is required in the case of foreign bills by the law of Scotland.

XV. Where any bill or note has been lost, stolen, or fraudulently obtained, the holder of such bill or note suing or doing diligence thereon shall be bound to prove that value was given by him for the same; but such proof may be made by parole evidence.

XVI. When any bill of exchange or promissory note shall, after the [\*958] passing of this Act, be indorsed after the period when \*such bill of exchange or promissory note became payable, the indorsee of such bill or note shall be deemed to have taken the same subject to all objections or exceptions to which the said bill or note was subject in the hands of the indorser.

XVII. From and after the passing of this Act, all carriers for hire of goods within Scotland shall be liable to make good to the owner of such goods all losses arising from accidental fire while such goods were in the custody or possession of such carriers.

XVIII. In relation to the rights and remedies of persons having claims for repairs done to or supplies furnished to or for ships, every port within the United Kingdom of Great Britain and Ireland, the Islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them, being part of the dominions of her majesty, shall be deemed a home port.

XIX. The Court of Session is hereby empowered from time to time, after the passing of this Act, to make such regulations by act or acts of sederunt as the said court may deem meet for carrying into effect the purposes of this Act: Provided always, that within fourteen days from the commencement of any future session of parliament there shall be transmitted to both houses of parliament copies of all acts of sederunt made and passed under the powers hereby given.

XX. In citing this Act it shall be sufficient to use the expression, "The Mercantile Law Amendment Act, Scotland, 1856."

XXI. Nothing in this Act contained shall apply to any part of the United Kingdom except Scotland.

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\*1. Section 1 creates a partial modification in the law of Scotland [\*959] regarding the contract of sale. According to that law the completion of the contract did not divest the seller of the property of the articles sold until delivery took place. One of the consequences of this principle was, that prior to the delivery the creditors of the seller might attach the goods sold, even

although the price had been paid by the purchaser, and on the same principle, on the bankruptcy of the seller, even although the price had been paid, the goods passed to the trustee for the seller's creditors, and the purchaser was ranked only for the price. This consequence, naturally following from the principle that the property in an undelivered article remained with the seller, and was only transferred to the purchaser by delivery, is now removed, and in future no creditor of a seller, or his trustee, in the event of sequestration, can attach the goods sold to the effect of preventing the purchaser or others in his right from enforcing delivery of them.

2. Section 2 creates another modification of the same principle, for, on the principle that goods sold but undelivered remained the property of the seller, another consequence naturally followed that the seller was entitled to retain possession of the goods sold, even although the price had been paid, on the ground that the purchaser was indebted to him in some other account, and this to the effect even of preventing a sub-purchaser from obtaining delivery of the goods. This last consequence of the principle is now abolished, and a sub-purchaser is now entitled to demand delivery of the goods, which demand cannot be resisted by the seller on the ground that the original purchaser is indebted to him in a debt other than the price of the goods. The seller, however, may still refuse delivery to a sub-purchaser on the ground that the price of the goods has not been paid, or that the obligations or conditions which were attached to the contract of sale had not been performed, or on the ground of any right of retention arising from express contract with the original purchaser.

3. As, however, the seller was now to be prevented from retaining the goods sold in respect of debts or obligations having no connection with the sale of the goods, it became proper that the seller should possess a power of attaching the goods by legal diligence in respect of such debts or obligations. To empower the seller to do this was merely to place him on an equal footing with the other creditors of the purchaser, and therefore section 3 empowers the seller to attach the goods while in his own possession by arrestment or poinding, at any time prior to the date when a sale by the original purchaser to a sub-purchaser shall have been intimated to him.

4. Section 5 assimilates the law of the two countries in regard to warranty of the goods sold. According to the law of Scotland, where an article was sold for full value there was an implied warrandice that the article was marketable, and fit for the purpose for which it was sold, and the seller was liable for any latent defect although unknown to him. According to the law of England again, in a simple contract of sale, the maxim *caveat emptor* applied, and a fair price for an article did not imply warranty that the article was marketable, and the seller was not liable for any latent defect unknown to him unless there was an express warranty, or such a direct representation as was tantamount to a warranty. The law of England is now the law of Scotland on this point; and the seller is not now held to have warranted the quality or sufficiency of the goods sold, if at the time of the sale he was without knowledge that the same was defective or of bad quality, unless he should have given an express warranty of the quality or sufficiency of the goods, or unless they shall have been expressly sold for a specified and particular purpose, in which case the seller is considered without such warranty to have warranted the goods for that purpose. This last proviso is also introduced from the law of England, for in the case of *Innes v. Bright*, May 25, 1829, 3 M. and B. 155, supra, vol. ii. 343, it was held that where an article was ordered to be manufactured for a particular purpose, the law implied warranty that it was fit for that purpose. It was also held, in the case of *Brown v. Edgington*, June 30, 1841, 2 S. N. R. 496, supra, vol. ii. 375, that where a seller is informed by the purchaser of the purpose for which an article is wanted, and the purchaser relies upon the skill and judgment of the seller in furnishing an article suitable for that purpose, there is an implied warranty on the part of the seller that the article is reasonably fit and proper for that purpose. According to the law of England, too, every affirmation made by a seller at the time of sale is a warranty, provided it appeared to be so intended. It is also held that when the description of an article sold relates to a matter of fact which is within the knowledge of the seller, such a description is taken to be a

warranty of the fact affirmed. Where, again, a description of the article relates to a matter of opinion in respect to which there can be no certain knowledge, it is not presumed of itself to be a warranty, but is a question to be determined with reference to the whole circumstances connected with the sale, whether it was intended as a warranty or as an expression of opinion merely. See the case of *Powell v. Barham*, January 14, 1846, 4 Ad. and Ell. 473, supra, vol. ii. 430. Where a picture is sold as the work of an artist some centuries back, it can only be matter of opinion whether it is the work of the artist whose name it bears, and if the seller only represents what he himself believes he is guilty of no fraud. See the case *Tenderville v. Slade*, 2 Esp. 572, supra, vol. ii. 533.

[\*961] 5. Although by the law of Scotland \*the general rule of law was that a cautionary obligation could only be proved by the writ or oath of the cautioner, yet there was this exception to the rule that it might be established by parole evidence, where it was an integral part of a contract between the creditor and principal debtor, which in itself might be proved by parole evidence. This exception is now removed by section 6 of the statute, and the law of the two countries in this respect is now assimilated.

6. Section 7 declares that no guarantee or cautionary obligation to or for a company or firm, shall be binding after any change in the firm, unless the contrary shall be expressly stipulated, or be necessarily implied from the nature of the firm or otherwise. This is not an alteration but a declaration of the law as previously laid down; the principle established in the case of *Bodenham v. Purchas*, 2 B. and Al. 39, supra, p. 661, being that where a guarantee is given to one firm for advances to be made to another firm, and a change takes place in the composition of either firm, the party giving the guarantee is not liable for advances made subsequent to the change, and the balance due at the date of the change will be diminished or extinguished by payments made subsequent to that date, unless specially appropriated by the debtor or creditor firm.

7. Section 8 alters the law by which a cautioner was allowed the benefit of discussion, so that now a creditor is at liberty to proceed at once against a cautioner without first discussing or doing diligence against the principal debtor, unless the contrary is stipulated in the deed, by which the cautioner became bound.

8. By the law of Scotland, the discharge of one co-cautioner operated as a discharge of the other co-cautioners only to the extent of the proportion which the discharged cautioner would have had to contribute if he had not been discharged. Section 9 alters the law in this respect, and declares that a discharge granted to one co-cautioner without the consent of the other co-cautioners shall operate as a discharge to all the cautioners. Where, however, a cautioner becomes bankrupt, and the other co-cautioners consent to his discharge the provision is not applicable.

9. By the law of Scotland, if a bill or note was blank in its date, summary diligence could not be used upon it, and even in an ordinary action, if the sum exceeded £8, 6s. 8d., the date could only be supplied by written evidence. The 10th section retains the provision as to summary diligence not being competent on a bill or note issued without a date; but in an ordinary action it is now competent to prove by parole evidence the true date at which such bill or note was issued.

10. In Scotland, a written promise to accept a bill on a separate paper from the bill was thought by some lawyers to amount to an acceptance of the bill so [\*962] as to be the foundation of an ordinary action, \*and that such promise completed the bill as an assignment, though summary diligence could not be used upon it. In England the acceptance of a foreign bill might be verbal or detached. By the 11th section it is enacted, "that no acceptance of any bill, whether inland or foreign, shall be valid unless it be in writing on the bill, or if there be more than one part of such bill, on one of the said parts."

11. A bill drawn in Ireland or England was held not to be an inland but a foreign bill, and so also was a bill drawn in Scotland upon England. Section 12 enacts that a bill drawn in the United Kingdom and the islands therein mentioned, and made payable in, or drawn upon any person resident in these places



shall be deemed to be an inland bill, but the stamp duty payable in respect of any such bill remains unaltered.

12. By the law of England it was not necessary for the holder of an inland bill to take a protest, although such protest was necessary in the case of foreign bills. By the law of Scotland a protest for non-acceptance or non-payment was necessary in the case both of inland or of foreign bills. Section 13 declares that a notarial protest shall no longer be necessary, except for the purpose of entitling the holder to proceed with summary diligence upon the bill.

13. The Act 12 Geo. II. cap. 72, declared, in reference to inland bills in Scotland, that it should be sufficient to preserve recourse if notice of the dishonor was given within fourteen days after the protest was taken. This was an unfortunate provision, as it made a great distinction between the notice of dishonour of inland bills in England and in Scotland. Section 14 annuls this provision, and declares that in the case of inland bills notice of dishonour must be given in the same manner, and within the same time as is required in the case of foreign bills.

14. According to the law of Scotland it was not necessary for the holder of a bill which had been lost, stolen, or fraudulently acquired to prove that he gave value for it, and this want of value could only be proved by his writ or oath. See vol. i. p. 229. This rule is altered by section 15, which enacts, that where any bill or note has been lost, stolen, or fraudulently obtained, the holder shall be bound to prove that he gave value for it, but the proof may be made by parole evidence.

15. According to the law of Scotland the indorsement of a bill after maturity did not render the holder liable to exceptions pleadable against the indorser unless the bill bore marks of dishonor upon it. See vol. i. p. 333. This is altered by section 16, which enacts, "that when any bill shall be indorsed after the period when it became payable, the indorsee shall be liable to all objections or exceptions to which the bill was subject in the hands of the indorser." This enactment is in accordance with the law \*of England, where the holder [ \*963 ] of a bill who has taken it after maturity, is subject to those equities which arise out of the bill itself, but not to those which might exist between the original parties, arising from collateral transactions. See vol. i. pp. 313, 336.

16. By the law of Scotland carriers were not liable for losses arising from accidental fires while the goods were in their custody or possession. This is now altered by section 17, which enacts their liability.

17. Section 18 declares that in relation to the rights and remedies of persons having claims for repairs done to, or supplies furnished to or for ships, every port within the United Kingdom, and the islands therein mentioned, shall be deemed to be a home port.



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2. No acceptance of a bill of exchange is now valid unless it is made in writing on the bill, and signed by the acceptor, or some person duly authorized by him, 946, 956.
3. All bills or notes drawn or made within the United Kingdom and the islands, mentioned in the Mercantile Law Amendment Acts on any party within the United Kingdom, or such islands, are held to be inland bills, 946, 956.
4. A notarial protest of an inland bill of exchange is not now necessary except for the purpose of summary diligence, 957.
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4. A party effecting a life assurance is bound to communicate to the assurer all material facts within his knowledge touching the subject-matter of the assurance, and it is a jury question whether any particular fact not communicated is or is not material, 729.
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6. It is most material that the medical man who has been in attendance on the life insured, if such an one there be, should be referred to, 752.

7. False answers to verbal inquiries on matters material will avoid the policy, although the printed list of inquiries did not embrace such matters, 754.
8. In a life policy containing a condition that it should be void if the party on whose life the assurance was effected should commit suicide, it is not necessary that the party committing suicide should be a responsible moral agent, able to distinguish between right and wrong, but it is sufficient if he intended to kill himself, and if he knew that the probable consequence of the act done by him was to deprive himself of life, 755.
9. Where a party assured commits a felony for which he is executed, the policy is avoided, although it should contain no condition relative to such an event, 783.

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2. It is repugnant, upon a contract of indemnity to recover as for a total loss, when the final event has decided that the damnification, in truth, is an average loss, or perhaps no loss at all, 805.
3. Where a ship is taken and recaptured, and on the recapture the captain acting fairly for the benefit of his employers sells the ship and cargo, and thereby puts an end to the voyage, the insured is entitled to recover as for a total loss, 810.
4. Where a ship is taken and recaptured, or necessarily deserted, and the owners have given notice of abandonment, and claimed as for a total loss, the subsequent recapture or recovery will not entitle the underwriters to settle as for a partial loss if the expenses attendant on the recapture or recovery are considerable, and the voyage cannot be advantageously prosecuted, 814.
5. Where the owner of a vessel insured abandons it to the underwriters, and claims as for a total loss, the underwriters become the owners of the vessel, and as assignees are entitled to the freight subsequently earned, the freight following as an incident the property in the ship, 835.
6. Where a vessel has been abandoned to the underwriter on the vessel, who thereby acquires right to the freight subsequently earned, the owner has no claim against the underwriter on the freight for the loss of the freight, 896.

## PARTNERSHIP.

1. In the absence of express stipulations between partners as to their respective shares in the profit and loss of the business of the copartnership, there is no presumption in law that the shares of the partners are equal, but the amount of their several shares is a question of fact to be determined by a consideration of the whole circumstances relating to the particular partnership, but in the absence of all controlling circumstances equality will be presumed to have been the intention of the partners, 381.
2. In order to constitute a real partnership there must be a communion of profit and loss, and a loan of money to a firm by a retiring partner for interest, and with an additional annuity for a certain term of years is not a continuance of the partnership, 400.
3. An agreement between two or more parties to purchase goods in the name of one of them, and to take aliquot shares of the purchase, but not to be jointly concerned in the resale of the shares, does not constitute the parties to such an agreement partners, and on the failure of the ostensible purchaser the other parties are not liable for the whole price as partners with him unless they have permitted him to hold them out to the seller as jointly answerable with him for the price, 404.
4. An agreement by two or more parties, having separate business concerns, to share in certain portions of the profits of their respective concerns constitutes a partnership in a question with third parties, although it is provided by the agreement that none of the contracting parties should be accountable for the acts or losses of the others, but each party only for his own, 426.
5. In order to constitute a partnership it is not necessary that there should be a community of interest in the

- capital stock as well as in the profit and loss, 442.
6. When a party advances money to another to assist him to prosecute an adventure on an agreement that he is to receive half of the profits of the adventure, he is not held to be a partner in a question with the other party, although he is so in a question with third parties, 451.
  7. Where a party has no interest in the stock of a company, and none of the rights and powers of a partner, but is merely in the employment of the copartners, and is to receive remuneration for his services in proportion to the profits of the concern, he is not held to be a partner, either as regards the partners, or as regards third parties, 453.
  8. If a person stipulates that as the reward of his labour he shall not have a specific interest in the business, but a given sum of money, even in proportion to a given quantum of the profits, that will not make him a partner, but if he agrees for a part of the profits as such, giving him right to an account, though having no property in the capital, he is as to third persons a partner, and in a question with third parties no stipulation can protect him from loss, 457.
  9. If a person as a reward for his labour chooses to stipulate for interest in the profits of a business, instead of a certain sum proportionate to those profits, he is as to third persons a partner, and no arrangement between the parties themselves can prevent it, 457.
  10. A man who is to have no profit may be a partner, if holding himself out as such, as by lending his name. He may also be a partner when the contract is that he shall suffer no loss. The true criterion is whether he is to participate in profit, 457.
  11. A dormant partner is liable in respect of the profits, but if retiring from or coming into the concern he suffer his name to be used, it is of no consequence whether he participate in the profits or not—the use of his name makes him liable as a nominal partner, 458.
  12. The equity of the principle that makes a person a partner in a question between third parties, although he is not one in a question with the partners themselves, except in the case of a nominal partner, has been doubted, 458.
  13. The act of any one partner binds the firm in all matters within the scope and objects of the partnership, although the act may be a fraud on the firm, unless the party founding on the act is cognizant of the fraud, 459.
  14. In the ordinary case, the granting a guarantee by one partner in the name of the firm, will not bind the firm, for such an act is not a necessary or natural incident of a partnership, 475.
  15. Proof of a previous course of dealing, in which guarantees were given, and to which the partners were privy, would be sufficient, 476.
  16. A copartnership is liable for the fraudulent acts, and is bound by the false representations, of any of the partners, 476.
  17. Where a partner acting in name of the firm for purposes of his own, or in violation of his powers as a partner, he will not bind the firm in the case of a party who is cognizant of his so acting, 486.
  18. In all contracts concerning negotiable paper, the act of one partner binds all, even although he sign his individual name, provided it appears on the face of the paper to be on partnership account, and to be intended to have a joint operation, 505.
  19. If a bill or note be drawn by one partner in his own name only, and it does not appear on the face of the bill to be on partnership account, or if one partner borrow money on his own security, the partnership is not bound by the signature, even although it was made for a partnership purpose, or the money was applied to a partnership use. In such a case, the partner and not the lender is the creditor of the firm, 505.
  20. The authority of one partner to bind another, by signing bills of exchange and promissory notes in the name of the firm, is only an implied authority, and may be rebutted by express previous notice to a party taking such security, that the other partners would not be liable for it, 507.
  21. Where the name of a firm is the name of one of the partners, and the business is carried on in his name only, a party founding upon a bill granted by that partner must show

- that it was granted by him as representing the firm, and not by himself as an individual, 508.
22. Where several parties engage in a joint adventure for the sale of goods to be contributed by the several parties respectively, the partnership is not held to be contemporaneous with the purchase of the goods by the several parties, and the whole partners are not liable for the purchases made by each of the parties, 518.
  23. Where goods are purchased in pursuance of a joint adventure, the partnership is held to be contemporaneous with the purchases, and all the parties are liable for the purchases made by each of the partners, 541.
  24. Where a party discounts a bill drawn by one of several partners in his own name, no action lies against the partnership, either upon the bill so drawn, or for money had and received through the medium of the bill, even although the proceeds were carried to the partnership account, 552.
  25. In England, one partner of a firm cannot bind the other partners by a deed under seal, although granted in the course of the business of the partnership, 557.
  26. Although in the case of an ordinary trading partnership, each partner may bind the rest by drawing and accepting bills, the managing partners of a joint-stock company have not that power unless it is conferred upon them by the deed of copartnery, 561.
  27. Where several parties engage in an adventure, and are to share in the general profits of the concern, but where each party is to furnish his own share of what is necessary for the continuous prosecution of the adventure, such as horses in running of a stage coach, the whole partners are not liable for contracts made by one partner in reference to what he is bound to contribute for the prosecution of the adventure, 573.
  28. In Scotland it has been held that the responsibility of shareholders in a joint-stock company, trading under a descriptive name, is limited to the extent of their share in the company, 580.
  29. By the Act 1 Vict. c. 73, the crown is empowered to grant letters of patent, restricting the individual liability of members of joint-stock companies to such extent as may be declared in the letters-patent, and in England limited liability may now be obtained by joint-stock companies, by complying with the provisions of the Act 18 and 19 Vict., c. 133, 584.
  30. A club is not a partnership, not being a trading company of persons engaged in a community of profit and loss, and the members are not liable for debts incurred by the committee of management for work done or goods supplied for the use of clubs, unless the committee had authority to pledge the personal credit of the members of the club, 585.
  31. Where no definite period of duration is fixed, a contract of copartnership may be dissolved at the will of any one of the partners, and a reasonable notice of dissolution is not requisite, but the partnership will continue as to all antecedent obligations until they are duly implemented, 607.
  32. Where a partnership is continued after the expiration of the original term provided for its duration, but no term for its continuance is fixed, the partnership may be dissolved by any one of the partners, in the same way as if no term had been originally provided for its duration, 615.
  33. In certain cases a dissolution of partnership may be decreed by a court of equity, before the expiry of the term for which it was originally entered into, as, for instance, where one of the copartners has been guilty of fraud, or of rash or reckless speculation in the business of the partnership, 621.
  34. Where one of the partners becomes disabled to act, or where the business of the copartnery becomes impracticable, a court of equity will decree a dissolution of the partnership, 621.
  35. Where there is no express stipulation as to the duration of a copartnery, its intended duration may sometimes be ascertained by implications and presumptions arising from the conduct of the partners, 621.
  36. Where a partner retires, becomes bankrupt or dies, he, or his creditors or representatives, are entitled to the value of his interest in the firm, which is to be ascertained not by a valuation, but by sale; and if before

- a settlement is made, the business is carried on by the remaining partners with the property of the firm, they are entitled to a share of the profits made subsequent to the dissolution, 622.
37. Where an ostensible partner retires, notice of the dissolution must be given to all parties who had previous dealings with the firm, but a notice in the Gazette will be sufficient in regard to parties subsequently contracting, who had no previous dealings with the firm, 632.
  38. Where a retiring partner has taken the proper steps for publishing his retirement, he will not be liable to parties ignorant of the dissolution of the firm, on account of obligations undertaken by the remaining partners, under the old name of the firm, 633.
  39. In England, where a dormant partner retires, he is not liable for the subsequent obligations of the firm, even although notice was not given to parties dealing with the firm, unless the fact of his being a partner was known to the party contracting, in which case notice to such party would be necessary, 635.
  40. In Scotland it has been held that notice of the dissolution of a copartnership, must be given to parties dealing with the firm, in case of a dormant, as well as in the case of an ostensible partner, 639.
  41. The customer of a banking firm may proceed against the estate of a deceased partner, for such debt as was due at the time of his death, in so far as not reduced by payments made by the surviving partners after that date, and subsequent dealings by the customer with the surviving partners, will not have the effect of creating a *novatio debiti*, and thereby relieving the estate of the deceased partner, 643.
  42. In the absence of express declaration, payments made by the customer of a banking firm, after the death of a partner, will be appropriated to the extinction of previous drafts in the order of priority, 643.
  43. Where a guarantee is given to one firm for advances to be made by it to another firm, and a change takes place in the composition of either firm, the party giving the guarantee is not liable for advances made subsequent to such change, and the balance due at the date of the change will be diminished or extinguished, made subsequent to that date, unless specially appropriated by the debtor or creditor firm, 661.
  44. The Mercantile Law Amendment Acts enact, that a guarantee to or for a firm, shall cease upon a change in the firm, unless the intention of the parties to the contrary shall appear either by express stipulation or by necessary implication from the nature of the firm or otherwise, 945, 955.
  45. Although after a change in the composition of a banking firm, the subsequent operations of a customer may have been entered in the books of the firm, as forming part of one account, if the account has not been so rendered to the customer the new firm are not precluded from afterwards separating the account, and rendering one portion of it as applicable to the old, and the other as applicable to the new firm, so as to make a guarantee possessed by them cover the balance due by the customer at the date of the change in the firm, 689.
  46. A contract of subpartnership does not subject the subpartner in the liability of a principal partner, and the extent of his liability will depend upon the subcontract, 697.
  47. Where a party procures another to hold shares in a copartnership for him, and undertakes to pay the deposits and all the calls upon them, though not the ostensible, he is held to be the real partner, and he is held subject to all the liabilities of the partnership, 700.

## PRINCIPAL AND AGENT.

1. Agency may be inferred from circumstances as well as constituted by expressed authority, and unauthorized acts of agency, acquiesced in one binding on the principal, 133.
2. An indorsation per procuration does not require a special mandate. The law will infer an authority from the general nature of the acts permitted to be done, 140.
3. A general agent acting within the scope of his authority, binds his principal, although acting against express private instructions, limiting or qualifying that authority, if these

- instructions are unknown to the party contracting with the agent, 140.
4. A special agent acting under a limited authority, cannot bind his principal if he exceed his authority, 140.
  5. A general agent is a person whom a man puts in his place to transact all business of a particular kind, 149.
  6. A particular agent is an agent employed specially in one single transaction, and it is the duty of the party dealing with such an one to ascertain the extent of his authority, and if he do not he must abide the consequences, 149.
  7. The ground of the distinction between general and special agency is the public policy of preventing frauds upon innocent persons, and the encouragement of confidence in dealing with agents, 150.
  8. It is a maxim of natural justice, that he who without intentional fraud has enabled any person to do an act which must be injurious to himself or to another innocent party, shall himself suffer the injury rather than the innocent party who has placed confidence in him, 150.
  9. The maxim fails in its application when the party dealing with the agent has a full knowledge of the private instructions of the agent, or that he is exceeding his authority, 150.
  10. Whoever deals with an agent for a special purpose, deals at his peril when the agent passes the precise limits of his power, 152.
  11. An agent who is employed generally to do any act, is authorized to do it in the usual way of business, and if he does it in any unusual way, his principal is not bound by his acts, 153.
  12. The representations of an agent respecting the subject-matter of a contract, will bind his principal, if made at the very time of the contract, and constituting part of the *res gestæ*; and the fraudulent or negligent concealments of an agent, where the other contracting party is entitled to a full disclosure, will also affect his principal, 154.
  13. Where a factor sells goods without disclosing the name of his principal, the purchaser is entitled to set off a debt due to him by the factor, in answer to the demand of the principal, 160.
  14. Where a factor dealing for a principal, conceals his principal, and sells in his own name, the person contracting with him has a right to consider him as the principal, and though the real principal may bring an action upon the contract of sale, yet the purchaser may set off any claim he may have against the factor, 162.
  15. Although a factor may buy and sell in his own name, as well as in the name of his principal, a broker is not entitled to do so, 162.
  16. Where a broker acts in his own name, he acts beyond the scope of his authority, and a purchaser from him cannot set off a debt due to him by the broker against the demand made by the principal, 162.
  17. A factor is a person intrusted with the actual possession of the goods, and is empowered to sell in his own name; but a broker is in a different situation, and the principal has a right to expect that he will not sell in his own name, 167.
  18. A *del credere* commission does not place a broker in the situation of a principal, and such commission imparts merely a guarantee of the solvency of the purchaser, and binds him to pay the price if the purchaser does not, 171.
  19. Where goods are sold by a factor, and the price has not been paid, or payment has been made by bill or note, not discounted at the date of the bankruptcy of the factor, the price or payment of the bill may be claimed by the principal, 179.
  20. Goods sent to the factor for sale, or purchased by him for behoof of his principal, and remittances made to a factor for a special purpose, may be reclaimed by the principal in a question with the creditors of the factor, 187.
  21. Where an agent is entrusted with property or money for a special purpose, and he misapplies the money or property so entrusted to him, the product of or substitute for such property or money, may be reclaimed by the principal, so long as it can be ascertained to be such product or substitute, 210.
  22. Where an agent contracts in his own name, he becomes personally liable on the contract, although the other contracting party knows that he is



- acting not as a principal but as an agent, 224.
23. Where an agent contracts in such a form as to make himself personally responsible, he cannot afterwards relieve himself from the responsibility, whether his principal was or was not known at the time of the contract, 245.
  24. Where an agent contracts as agent, but without disclosing the name of his principal, the other contracting party is not barred from proceeding against the principal, although he had originally debited the agent, unless in the meantime the principal shall have settled with the agent, 249.
  25. Where an agent contracts in his own name, and the other contracting party knows that he is acting for a principal, and also knows who the principal really is, and chooses to make the agent his debtor, dealing with him only, he cannot afterwards, on the failure of the agent, proceed against the principal, 259.
  26. An unknown principal, when discovered, is liable on the contract which his agent makes for him, but a party may preclude himself from recovering against the principal by knowingly making the agent his debtor, 264.
  27. A principal is not liable for any damage occasioned by the acts of a sub-agent, 266.
  28. A master is responsible for the acts of his servant, upon the principle that *qui facit per alium facit per se*, but that liability ceases where the relation itself ceases, 274.
  29. A principal is not liable for the damage occasioned by his agent in any matters beyond his agency, nor is a master liable for the wilful and malicious acts of his servant, although committed by him while acting in the service of his master, 291.
  30. By the law of England a master is not liable to a servant for damage occasioned by a fellow-servant, if he has taken reasonable care to protect his servants from the risk of injury by associating them only with servants of ordinary skill and care—a servant being held to run the risk arising from the negligence of his fellow-servants, 296.
  31. A different rule prevails in the law of Scotland, 298.
  32. An agent cannot bind his principal by a contract in which he has or may have a personal interest conflicting, or which may possibly conflict with the interest of his principal, and no inquiry is allowed as to the fairness or unfairness of the contract, 305.
  33. A person who is an agent for another, undertakes a duty in which there is confidence reposed, and he is bound to execute such duty to the utmost advantage of the person who employs him, 321.
  34. A factor has a general lien upon the goods of his principal in his possession, and upon the price of such as have been lawfully sold by him, or upon the securities given upon them, as well as for the general balance of the factorial accounts between him and his principal, or for the charges and disbursements arising upon such goods, but his right of lien does not extend to debts contracted before and without reference to the existence of the relation of principal and factor, 346.

## PRINCIPAL AND SURETY.

1. In England a contract of guarantee must be in writing, and formerly, if it were made in writing not under seal, the consideration required to appear on the face of the instrument, either expressly or by clear implication, or from other documents connected with the instrument, but it could not be supplied by parole evidence, 1.
2. The principle of the above rule was, that the common law protected men against improvident contracts. If, therefore, they bound themselves by deed, it was considered that they must have determined upon what they were about to do before they made so solemn engagement; and therefore it was not necessary to the validity of the instrument, that the consideration should appear on it. In all other cases the contract was invalid, unless the party making the promise was to obtain some advantage, or the party to whom it was made must have suffered some inconvenience in consequence of the one making, or the other accepting such promise. The consideration must appear on the instrument, not in any set formal terms, but with clearness

- enough for the courts, to judge of its sufficiency. It may be collected or implied from the instrument itself, but not as matter of conjecture, but with certainty, 13-16.
3. The English Mercantile Law Amendment Act, enacts that a guarantee shall be valid, although the consideration does not appear in writing, or by necessary inference from a written document, 950.
  4. In Scotland the general rule of law is, that a cautionary obligation cannot be established except by a probative writing, but if a *rei interven-tus* took place on the faith of the obligation, the granter of the obligation would be liable, 17.
  5. An improbable document is validated by a *rei interven-tus* following on such document, 20.
  6. The rule that a cautionary obligation must be constituted by a probative writing, suffered another exception where the cautionary obligation was undertaken at the same time with the principal obligation, when the principal obligation itself was one which ought to be established by witnesses. In such a case, the cautionary obligation was also allowed to be established by witnesses, 21.
  7. The Mercantile Law Amendment Act for Scotland removes this exception from the general rule, so that a cautionary obligation can now only be established by writ, 961.
  8. In Scotland letters of guarantee granted in reference to mercantile transactions are sustained, though neither holograph nor tested, 22.
  9. Where there are different cautioners for the same debt, they are all entitled to a proportional relief from one another, whether they are bound in one deed or in separate deeds, unless it shall be made to appear that some of them became bound for the relief of the other cautioners, such cautioners are entitled to a total relief, 28.
  10. Although one party should become a surety without the knowledge of another surety, that circumstance does not prevent the operation of a proportionate relief between them. The creditor, who can call upon both, is not at liberty to fix one with payment of the whole debt, and if he will not do justice between the cautioners, the court will do it for him, 37.
  11. A cautioner may, however, withdraw himself from the operation of a proportionate relief, by engaging to pay only if payment is not obtained from the other cautioners, 37.
  12. The general rule of law is, that all cautioners have a claim *pro rata*, whether they be bound in one or more deeds, seeing that they are bound for behoof of and at the request of the principal debtor alone. It may, however, be shown that the new obligation has been entered into on account of the cautioners, as well as on account of the principal. In such a case there is an exception from the general rule, and the new cautioners have a relief from those for whose benefit they became bound, 45.
  13. A surety is entitled to be made acquainted with the whole contract entered into with his principal, and the withholding from the surety, with the knowledge of the creditor, of any circumstance which is calculated to affect his responsibility, amounts to a fraud on the surety, and discharges him of his liability, 49.
  14. It is the duty of a party taking a guarantee, to put his surety in possession of all the facts likely to affect the degree of his responsibility, and if he neglects to do so it is at his peril, because the contract is void if a fact materially affecting the nature of the obligation was not communicated to the surety, 52.
  15. If a party knowing himself to be defrauded by an agent, and concealing that fact, applies for security in such a manner and under such circumstances as held him out to others as one whom he considered as a trustworthy person, a guarantee so obtained would be void, 71, 73.
  16. It is not necessary to void a contract of guarantee, that the concealment or non-communication of material facts should be wilful and intentional, with a view to the advantage of the party not making the communication, 92.
  17. If the party applying for a guarantee has facts within his knowledge which it is material the surety should be acquainted with, and if he does not disclose these facts, the conceal-

- ment of such facts discharges the surety, and it is wholly immaterial whether the facts were concealed from one motive or another, 93.
18. The liability of a surety depends upon the situation in which he is placed, upon the knowledge which is communicated to him of the facts of the case, and not upon what is passing in the mind of the party applying for a guarantee, or the motive of such party, 94, 95.
19. Any alteration in the contract with the principal, without the consent of the surety, by which his situation is made worse, discharges the liability of the surety, but mere forbearance by the creditor to exact payment from the principal will not have that effect, 96.
20. Formerly by the law of Scotland, the discharge of one co-cautioner operated as a discharge of the other co-cautioners, only to the extent of the proportion which the discharged cautioner would have had to contribute if he had not been discharged. The Mercantile Law Amendment Act for Scotland alters the law in this respect, and declares that a discharge granted to one co-cautioner without the consent of the other co-cautioners, shall operate as a discharge to all the cautioners. This provision, however, is declared not to be applicable to the case where a cautioner becomes bankrupt, and a co-cautioner consents to his discharge, 956.
21. When a co-surety obtains from a principal debtor a security, he is not entitled to apply the whole proceeds to his own relief, but is bound to communicate the security to the other co-sureties; but if he is a creditor of the principal debtor in other obligations, he is entitled to apply the security first in satisfaction of these obligations, 111.
22. Where co-sureties are not bound for the whole debt, but each for a particular sum, a co-surety who obtains a security from the principal debtor, is not bound to communicate the benefit of it to the other co-sureties, 117.
23. Where a creditor proceeds first against the estate of an insolvent co-surety, he is ranked on such estate for the full amount of the whole debt, and the creditors of such co-surety have no claim of relief against the other co-sureties, except in so far as the amount of dividend received from the estate of the insolvent co-surety exceeds the sum which he would have paid if he had continued solvent, 118.
24. Where a co-surety obtains from the principal debtor a security, the creditors of the principal debtor are not entitled to object to the benefit of the security being communicated to the other co-sureties, 126.
25. A co-surety who has paid the full amount of the debt of the principal debtor, is not entitled to rank on the estate of an insolvent co-surety for the whole debt, to the effect of enabling him to draw the sum which the insolvent co-surety would have paid if he had continued solvent, but he is entitled to rank for that sum only, 129.
26. Where a guarantee is given to one firm for advances to be made by it to another firm, and a change takes place in the composition of either firm, the party giving the guarantee is not liable for advances made subsequent to such change, 661.
27. The Mercantile Law Amendment Acts declare that no guarantee to or for a firm, shall be binding after a change shall have taken place in the persons constituting the firm, unless the contrary shall be expressly stipulated, or be necessarily implied from the nature of the firm or otherwise, 945, 955.
28. Formerly by the law of England, a surety could not obtain the benefit of such bonds or judgments, or other securities, as were held to be extinguished by the performance by him of the principal obligation, and he was entitled only to an assignment of any bond or security by the principal debtor, other than those that were so extinguished. Section 5 of the Mercantile Law Amendment Act assimilates the laws of England and Scotland in this respect, by enacting that a surety, or co-surety, co-debtor, or co-contractor, who now discharges his liability, shall be entitled to an assignment of all securities held by the creditor, and may proceed against the principal debtor, or any co-surety, co-contractor, or co-debtor, for the advances made and sustained by him, provided he

does not recover from the co-surety, co-contractor, or co-debtor more than the just proportion for which, as between these parties themselves, he is to be justly liable, 945, 951.

29. Formerly by the law of Scotland, a cautioner was allowed the benefit of discussion, but this is now altered by the Act, section 8, and a creditor is now at liberty to proceed at once against a cautioner, without first discussing or doing diligence against the principal debtor, unless the contrary is stipulated in the deed, by which the cautioner became bound, 955.

#### SALE.

1. By the Mercantile Law Amendment Act of England, the right of persons acquiring title to goods *bona fide*, and for a valuable consideration, before they have been attached under a writ against the seller, is sustained, 943.

2. By the same Act, specific delivery of goods sold may be enforced, 944.
3. By the Mercantile Law Amendment Act of Scotland, goods sold, but not delivered, are not attachable by the creditors of the seller, 953.
4. By the same Act, a seller is not entitled to a right of retention of goods not delivered against a sub-purchaser for any debt or obligation due to him by the original purchaser, except for payment of the price, or for performance of the obligations or conditions of the contract of sale, 954.
5. By the same Act, a seller of goods undelivered may attach them while in his possession, by an arrestment or poiding prior to the intimation to him of a sub-sale, 954.
6. By the same Act, a seller is not held to warrant goods unless he shall have given an express warranty in the contract of sale, 954.













